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No. 81-6908

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELWOOD C. BARCLAY,

Petitioner,

—against—

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

(1) Whether a death sentence, imposed over a jury recommendation of life, violates the Eighth and Fourteenth Amendments when it is based upon a trial judge's findings of (a) factors not included in the roster of statutory aggravating circumstances; (b) factors found only by distorting the statutory aggravating circumstances beyond recognition; and (c) factors freighted with emotions arising from the judge's prior experiences, extraneous to the circumstances of the crime or the character of the defendant?

(2) Whether a death sentence imposed through such an arbitrary process can nonetheless be executed because the

trial judge may additionally have found one or more properly applicable statutory aggravating factors?

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ELWOOD C. BARCLAY,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

OPINIONS BELOW

The judgment and findings of fact entered when petitioner was initially sentenced to die by the Circuit Court of Duval County, Florida are unreported and appear at J.A.

1-53. The initial opinion of the Supreme Court of Florida affirming petitioner's conviction of first degree murder and sentence of death by electrocution is reported in Barclay v. State, 343 So.2d 1266 (Fla. 1977); J.A. 54-77.

The subsequent order of the Supreme Court of Florida vacating the sentence of death and remanding for resentencing in light of Gardner v. Florida, 430 U.S. 349 (1977), is reported in Barclay v. State, 362 So.2d 657 (Fla. 1978); J.A. 78-81. The judgment and findings of fact on resentencing are unreported and appear at J.A. 82-141. The opinion of the Supreme Court of Florida affirming the reimposition of the death sentence is reported in Barclay v. State, 411 So.2d 1310 (Fla. 1981); J.A. 142-45.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3), the petitioner having as-

serted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Florida was entered on June 4, 1981. A timely petition for rehearing was denied by that court on April 14, 1982. The petition for certiorari was filed on June 16, 1982 and granted on November 8, 1982. ___ U.S. ___, 51 U.S.L.W. 3362 (U.S., Nov. 8, 1982) (No. 81-6908).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

This case also involves the following provisions of the statutes of the State of Florida, which are set forth in the Appendix to this brief: Fla. Stat. §§782.04, 921.141.

STATEMENT OF THE CASE

1. Introduction

On June 17, 1974, the dead body of eighteen-year-old Stephen A. Orlando was discovered on a dirt road in Jacksonville Beach, Florida. (T.T. 169).[1/] The cause of death was a bullet which entered the left ear.

1/ References to the transcript of Barclay's trial, held in the Circuit Court of the Fourth Judicial District in and for Duval County, Florida, from February 21, 1975, through March 4, 1975, are indicated by the abbreviation "T.T." followed by the number of the page(s) on which the reference may be found. The abbreviation "V.T." refers to the transcript of the voir dire; "S.T." to the transcript of the separate penalty trial held on March 5, 1975; "R." to the record on appeal; "R.T." to the transcript of the resentencing hearing on June 23, 1979, October 23, 1979, and April 18, 1980; "A." to the Appendix to Petitioner's Brief; and "J.A." to the Joint Appendix.

(T.T. 126, 133). Orlando also sustained another bullet wound in the cheek, and several superficial stab wounds. (T.T. 126). A note was found under a small pocketknife lying on his stomach. (T.T. 317-18, 321, 324).[2/] The note stated that "the revolution" had begun and that the "atrocities and brutalizing" of black people by the "oppressive state" would no longer go "unpunished." The note was signed "The Black Revolutionary Army. All power to the people." (J.A. 57; Barclay v. State, 343 So.2d 1266, 1267 (Fla. 1977)).

Several days later Orlando's mother and local radio and television stations received cassette tapes in which the speakers declared that Orlando was the first victim in "the revolution." (T.T. 157, 408-09, 1022). The tapes contained diatribes against "white racist America," listed the historic grievances

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2/ There is some evidence that the note may have been stuck to the body with the knife before it was found. (T.T. 324-25).

of black people, and compared the murder of Orlando to the lynchings and other murders of black people in America. (T.T. 1014-43). The tapes described Orlando's murder, claiming he had begged for mercy "just as black people did when you took them and hung them to the trees, burned their houses down, threw bombs in the same church that practices the same religion that you forced on these people, my people." (T.T. 1019-20). Each tape ended, "Your Black Liberation Army." (T.T. 1021, 1023, 1026, 1031, 1042-43).

Three months later, five young black men, Jacob Dougan, Dwyne Crittendon, Brad Evans, William Hearn and petitioner Elwood Barclay, were arrested for Orlando's murder. All but Hearn were indicted for first degree murder by a grand jury for Duval County, Florida. (R. 5). Hearn was charged by information with second degree murder and allowed to plead guilty to that offense in exchange for his

testimony against the other four. (T.T. 1349). The four were tried together. The jury returned verdicts finding Crittendon and Evans guilty of murder in the second degree, and finding Barclay and Dougan guilty of murder in the first degree. (T.T. 2301-02).[3/] After a penalty trial under Florida's bifurcated sentencing system, the jury recommended that Barclay be sentenced to life but Dougan be sentenced to death. (S.T. 179-80). The trial judge refused to follow the jury's recommendation as to Barclay and sentenced both young men to death. (J.A. 52).

2. The Trial

a. The Guilt Trial

Hearn was the state's key witness at the trial. He testified that he knew the four defendants from a karate class they all attended taught by Dougan. (T.T. 1351). On

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3/ The statute defining first degree murder, Fla. Stat. §782.04, is set forth in the Appendix to this brief, A. 1a-2a.

Sunday, June 16, 1974, Hearn was playing basketball with Crittendon, Evans and Barclay. (T.T. 1352-54). Dougan arrived and asked Hearn if he had his gun with him, because Dougan wanted "to go out and scare some people." (T.T. 1353). Dougan said he was willing to do it by himself, but that it would be better if they all went together. When Hearn asked what it was they were going to do, Dougan said he'd tell them later. (T.T. 1354). He instructed them all to go home and change into dark clothes. (T.T. 1354-55).

The five young men met again at Barclay's house about an hour later, sometime around 8:00 or 8:30 in the evening. (T.T. 1356). Hearn brought a .22 caliber automatic pistol with him, which he gave to Dougan. (T.T. 1356, 1358). Barclay had a "small pocket-knife." (T.T. 1357). The five got into Hearn's two-door car with Hearn driving, Crittendon in the front passenger seat, and the

rest in the back seat. Dougan told them he would instruct them on where to go and what to do. (T.T. 1358, 1381).

After driving for a short time, Dougan instructed Hearn to pull the car to the side of the road under a street light. Hearn did, and Dougan wrote out a note. Dougan read the note to the group and passed it around. Hearn asked again what they were going to do, and Dougan again replied he would tell them later. He told Hearn to drive on, and Heard did so. Dougan continued to direct the route until they arrived at a monument. There Dougan announced that they would "catch a white devil and kill him and leave the note on him." (T.T. 1359-61).

For the next couple of hours, the five drove around Jacksonville, looking unsuccessfully for an isolated person in an isolated area. (T.T. 1363-65). Finally the group headed to Jacksonville Beach, arriving about

10:30 p.m. There they saw Orlando, a young white man, hitchhiking by the side of the road. Hearn stopped the car, and Orlando entered the car and sat between Dougan and Evans in the back seat. (T.T. 1370). The car headed south toward the beach. Orlando told the group his name, and they each told him their names. Orlando asked them if they "smoked reefer" (marijuana). Dougan replied that they did, and asked Orlando if he had any with him. Orlando said he did not, but could get them some from a house on 12th Street. (T.T. 1370). When they got to 12th Street, Dougan told Hearn to drive past the street and keep going straight. Hearn did. (T.T. 1371). Dougan directed the route once again. A police car passed by, and Orlando said, "That pig sure is watching us close." Someone asked him if he disliked police officers, and he replied, "Well, my father's one." Dougan then told Orlando that he was taking him to meet a black girl who could give him some

drugs. (T.T. 1372). As they approached a road, Dougan announced they were getting close to where the girl lived. (T.T. 1377). They turned, then turned again down a dirt road into a wooded area. Dougan told Hearn to stop the car. He did. (T.T. 1380).[4/]

Hearn opened the door on the driver's side and held his seat back but did not leave the car. Crittendon opened the door on the passenger side, got out, and held the seat back. Barclay got out on Hearn's

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4/ The trial judge's original sentencing order stated that Orlando was driven to the scene of the homicide "[a]gainst his will and over his protest" (J.A. 9). This finding was quoted in the opinion of the Florida Supreme Court on Barclay's first appeal. (J.A. 56; Barclay v. State, supra, 343 So.2d at 1267). There is simply no evidence in the record to support such a finding, and the finding does not reappear in the second sentencing order (J.A. 82-141). The only evidence of Orlando's statements or actions during the car ride comes from Hearn's testimony at the trial (T.T. 1370-79), and the entire substance of those statements and actions has been described in our text above. The judge and the prosecutor agreed that Orlando had entered the car voluntarily (T.T. 1913), and the prosecutor acknowledged during his closing argument to the jury that Orlando's first reaction of "protest" occurred after the car stopped and Dougan ordered Orlando to step outside. (T.T. 2026).

side, Dougan on Crittendon's. As Dougan got out he said, "This is it, sucker, get out." Orlando got out behind Dougan and broke to run. (T.T. 1381). Dougan hit Orlando in the back with the gun. Barclay, who apparently had moved around the car, then grabbed Orlando. Evans got out of the car and stood behind Dougan; Orlando was standing between Dougan and Barclay. (T.T. 1384). Hearn watched from the front seat of the car, looking back over his shoulder at the group. (T.T. 1383). He saw Dougan put his hand on Orlando's back and jerk it, throwing Orlando to the ground. Barclay "started stabbing" Orlando, who offered to give them a "bag of reefer." (T.T. 1385). Barclay stabbed Orlando more than once, although Hearn could not say how many times. Dougan told Barclay to move back, and then fired twice. (T.T. 1385). Dougan pulled the gun up, shook it, and tried to fire again but the gun wouldn't go off. (T.T. 1386). Evans

moved up close, went down toward the body a couple of times, and then stood up with the note in his hand. Barclay took the note, went down toward the body with it, and then Evans, Dougan and Barclay returned to the front of the car. (T.T. 1387). The car headed back to Barclay's house. (T.T. 1388).

Hearn next saw the others on Tuesday at the karate class. Dougan told Hearn to bring his car the next day because there was going to be a meeting at the house of another member of the karate class, James Mattison. (T.T 1396). The next evening after the class ended, Hearn, Dougan, Crittendon, Evans, Barclay and three other students from the class (Otis Bess, Edred Black and James Mattison) met at Mattison's house. (T.T. 1397). There Crittendon, Evans, Dougan and Barclay discussed the murder. Dougan had brought a tape recorder and he suggested that everyone present make tapes. No one disagreed. (T.T. 1399). Dougan then wrote

out a script for each person to read into the microphone. (T.T. 1402). Barclay suggested some additions to Dougan's script. (T.T. 1403).

Hearn testified that all the tapes made that night referred to the killing, and that he personally saw Black, Dougan and Barclay making tapes. (T.T. 1399, 1403). He said that although the taped messages depicted Orlando as begging for mercy, Orlando never had. Barclay only added that to "make it seem more aggressive." (T.T. 1403).

Black, Bess and Mattison also testified for the State. Each admitted being present while the tapes were made, and Black and Mattison admitted making tapes themselves, similar in all respects to those made by Barclay and Dougan. (T.T. 949, 977, 1182). The three men each denied any direct knowledge of Orlando's death. Black and Mattison claimed to have made the tapes from a script prepared

by Dougan. (T.T. 990, 996, 1182). They corroborated Hearn's testimony that Dougan was the person who suggested making the tapes, brought the tape recorder, and directed the production of the tapes. (T.T. 938, 950, 958-59, 986, 1155-56, 1160, 1181, 1276, 1283, 1307). Five of the tapes -- only those recorded by Barclay and Dougan -- were introduced into evidence and played for the jury. (T.T. 1009, 1014-43). Black testified to incriminating statements made by Crittendon (T.T. 1159), Evans (T.T. 1159, 1183),[5] Dougan (T.T. 1182) and Barclay (T.T. 1183). Bess corroborated the testimony to some extent. (T.T. 1279, 1281, 1287).

An expert for the State testified that the note found on Orlando's body was written by Dougan. (T.T. 1112). Another testified that a cartridge case found by the body was

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5/ Evans allegedly stated he tried to stick the knife in the victim's chest but it kept folding up. (T.T. 1183).

fired from Hearn's gun. (T.T. 1550).

Crittendon, Dougan, Evans and Barclay each took the stand. Crittendon, Dougan and Barclay admitted having made the tapes, but claimed they did so at Mattison's urging and direction. (T.T. 1608, 1616, 1773, 1782, 1805). All four denied complicity in the homicide. (T.T. 1607, 1609, 1773, 1789, 1817).

After each side had rested, the trial judge called all counsel into chambers to discuss the charges that would be given to the jury before its deliberations on guilt or innocence. It was at first agreed by all counsel and the trial judge that no felony-murder charge would be given because of a lack of any basis in the record for such a charge. (T.T. 1912-13, 1918-19). However, when the court later brought up the possibility of a charge on murder in the third degree -- which is defined in Florida as murder in the course of a felony not enumerated in the first and

second degree felony-murder provisions -- defense counsel decided that they were unwilling to waive a charge on the lesser included offense of murder in the third degree. (T.T. 1924, 1975). The state attorney then insisted that the felony-murder provisions of first and second degree murder be charged as well, to avoid confusing the jury; and the trial judge ultimately agreed. (T.T. 1925, 1975). The jury was subsequently instructed on both premeditated and felony-murder. (T.T. 2230, 2232).

b. The Sentencing Trial

At the sentencing hearing, Dougan produced several witnesses to testify to his good character. (S.T. 59, 61, 64, 66, 70). No additional testimony was presented on Barclay's behalf. The State then brought Hearn back to testify about a second homicide committed by Crittendon and Evans at Dougan's direction, where Hearn once again acted as driver and

observer. (S.T. 90-111). Barclay was in no way implicated in the second homicide, and was unquestionably out of town when it occurred. (S.T. 109-110).

During closing argument, Barclay's attorney informed the jury that Barclay was twenty-three years old, married and the father of five children, had never been convicted of a crime and had no criminal charges pending against him (S.T. 154). He highlighted the disparity in treatment of Hearn, Crittendon and Evans, who all faced punishment for only second degree murder and would be eligible for parole immediately upon their incarceration, while a life sentence for Barclay under the first degree murder statute would make him ineligible for parole until he was forty-eight years old. (S.T. 156). He further noted that Barclay was a follower, not a leader, and that he acted under the domination of another. (S.T. 155).

In its verdict, the jury expressly found that "sufficient aggravating circumstances do not exist to justify a sentence of death; ... [and that] sufficient mitigating circumstances do exist which outweigh any aggravating circumstances," and the jury concluded that life imprisonment was the appropriate punishment for Barclay. (S.T. 180).

The trial judge dismissed the jury and ordered that a presentence investigation report be prepared on each defendant. (S.T. 181). On April 10, 1975, he imposed death sentences on both Barclay and Dougan, despite the jury's verdict of life for Barclay, issuing a single order applicable to both young men. (J.A. 52; see J.A. 1-53).

3. Post-Trial Proceedings

Barclay's and Dougan's automatic appeals to the Florida Supreme Court were heard and decided together. (J.A. 54; Barclay v. State, 343 So.2d 1266 (Fla. 1977).) The court af-

firmed the convictions and death sentences for both, holding that if it did not affirm Barclay's death sentence, "[t]wo co-perpetrators who participated equally in the crime would have disparate sentences...." (J.A. 72; 343 So.2d at 1271). The court did not review each of the trial court's findings of aggravating circumstances applied to Barclay. Instead, it noted the aggravating circumstances found in Dougan's case, held that those findings were "well documented,"[6/] and recited that "[a]s regards Barclay ... virtually the same considerations apply with respect to conse-

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6/ The Florida Supreme Court's description of the trial court's findings is puzzling. It correctly states that the trial judge found no mitigating circumstances as to Dougan, and then lists among the facts pertaining to Dougan that he "had no significant history of prior criminal activity," unquestionably a statutory mitigating factor. (Fla. Stat. §921.141(6)(a) ("the defendant has no significant history of prior criminal activity.") (J.A. 68; 343 So.2d at 1270). In discussing the aggravating circumstances applicable to Dougan, the Florida Supreme Court dropped a footnote describing the aggravating circumstances which the trial judge purportedly did not find; in fact, however, he unambiguously did find two of those. Compare J.A. 34, 35 with J.A. 69; 343 So.2d at 1271 n.3.

quences of the criminal episode." (J.A. 71; 343 So.2d at 1271). The court did not discuss the factual basis for those aggravating circumstances found by the trial court in Barclay's case which are directed toward the character of the defendant rather than the circumstances of the offense, Fla. Stat. §921.141(5)(a) ("The capital felony was committed by a person under sentence of imprisonment"), and Fla. Stat. §921.141(5)(b) ("The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person"). Both of those factors are at issue in the present proceeding.

The Supreme Court of Florida subsequently vacated the death sentences imposed on both Barclay and Dougan in light of this Court's decision in Gardner v. Florida, 430 U.S. 349 (1977), since there was a possibility that the trial court had relied on a presentence investigation report which the defendants had had no

opportunity to rebut, deny or explain.

New counsel was appointed for Barclay, and a resentencing hearing was held in three parts on June 23, 1979, October 23, 1979 and April 18, 1980, before the trial judge who had imposed the death sentence originally. A law enforcement officer who had investigated the case was called by the defense (R.T. 4), and testified that Dougan was the leader of the group (R.T. 20-21), although Barclay was "second in command" (R.T. 24) because he was older and smarter than Crittendon, Evans and Hearn. (R.T. 28). Counsel for Barclay argued that the trial judge's original sentencing order contained a number of errors, including the finding of a nonstatutory aggravating circumstance and the overbroad interpretation of several statutory aggravating circumstances. (R.T. 56-94). The trial judge reimposed the death sentence. (R.T. 128). His new sentencing order was a virtual duplication of his original order, different only in the

omission of a few findings that he had made earlier, principally those findings relating to Dougan, whose resentencing had been separately conducted. (J.A. 89).7/

Once again the Florida Supreme Court affirmed on appeal, this time with no analysis at all of the trial judge's order. (J.A. 142-45; Barclay v. State, 411 So.2d 1310 (Fla. 1981)). The court deemed all sentencing issues other than those concerning conformity with its Gardner remand order to have been decided by the original appeal. (J.A. 144-45). Rehearing was denied on a three-to-three vote

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7/ The Florida death-sentencing statute, Fla. Stat. §921.141 (Supp. 1976-1977) was amended in 1979 to clarify that mitigating circumstances are not limited to those in the statute, and to add an aggravating circumstance ("The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification"). See Fla. Stat. §921.141(5)(i)(Supp. 1982). The jury recommended life and the judge sentenced Barclay to death under the older version of the statute. On resentencing in 1980, the trial judge appears to have used the older version as well, because his recitation of the aggravating circumstances considered did not include Fla. Stat. §921.141-(5)(i). See Sentencing Order, J.A. 134.

of the Justices. (J.A. 146).[8] This proceeding on certiorari followed.

SUMMARY OF ARGUMENT

Elwood Barclay's death sentence was imposed through procedures bearing scant resemblance to those which this Court approved in Proffitt v. Florida, 428 U.S. 242, 251 (1976) (opinion of Justices Stewart, Powell and Stevens), as appearing "[o]n their face ... to meet the constitutional deficiencies identified in Furman [v. Georgia, 408 U.S. 238 (1972)]."

In Part I(A) below, we show that Barclay's trial judge overrode a jury recommendation of life and sentenced Barclay to die on the basis of (1) factors not included in the list of "statutory aggravating circumstances," Proffitt v. Florida, supra, 428 U.S. at 250,

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8/ Of the nine justices in the two appeals, four dissented from the affirmance of the death sentence, and a fifth (who had not heard either appeal) would have voted for rehearing of the decision affirming the sentence after the Gardner remand.

which are supposed to give "specific and detailed guidance" to the capital sentencing decision, id. at 253; (2) factors found only by distorting the statutory aggravating circumstances beyond recognition, so as to nullify their effect as guarantors of even minimal "consistency in the imposition [of the death penalty] at the trial court level," id. at 252; and (3) factors not "focus[ed] on the circumstances of the crime and the character of the individual defendant," id. at 251. In Part I(B), we demonstrate that this sentencing procedure was unconstitutional, as the very antithesis of "an informed, focused, guided, and objective inquiry into the question whether [Barclay] ... should be sentenced to death," id. at 259.

In Part II below, we show that the affirmance of the resulting death sentence by the Florida Supreme Court violated every

precept of a system of appellate review in which the "reasons [for a death sentence], and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law," id. at 259-60. Part II proceeds by (A) describing the rules of Elledge v. State, 346 So.2d 998 (Fla. 1977), which purport to define the circumstances under which lawless findings of aggravating circumstances require reversal of a death sentence by the Florida Supreme Court; (B) showing that Barclay's death sentence must be reversed under any consistent and evenhanded administration of the Elledge rules; and (C) showing that, insofar as the Elledge rules do not require the reversal of Barclay's death sentence, they cannot be squared with Due Process or the Eighth Amendment.

ARGUMENT

I. BARCLAY'S DEATH SENTENCE WAS THE PRODUCT OF A CAPRICIOUS SENTENCING PROCESS, FLOUTING THE SAFEGUARDS WHICH PROFFITT RELIED UPON TO ASSURE AGAINST ARBITRARINESS IN DEALING OUT THE DEATH PENALTY

A. Barclay's Death Sentence Rests Preponderately Upon Lawless Findings and Considerations Not Channelled By The Florida Capital Sentencing Statute

This Court is familiar with the manner in which the Florida death-penalty statute is supposed to work. First, an advisory jury "is directed to consider '[w]hether sufficient mitigating circumstances exist ... which outweigh the aggravating circumstances found to exist; and ... [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.'" Proffitt v. Florida, supra, 428 U.S. at 248. The sentencing judge is supposed to follow a jury's recommendation of life unless "'the facts suggesting a sentence of death

[are] ... so clear and convincing that virtually no reasonable person could differ.'" Id. at 249. The facts governing this latter decision are required to be set forth in writing, following a process in which the trial "judge is also directed to weigh the statutory aggravating and mitigating circumstances . . . ." Id. at 250.

Since Barclay's jury recommended life -- explicitly finding that "sufficient mitigating circumstances do exist which outweigh any aggravating circumstances" (S.T. 180) -- the crux of the present case is the set of findings upon which the trial judge relied to override the jury's recommendation and impose a death sentence. We turn immediately to these, and show that they include (1) findings of nonstatutory aggravating circumstances, (2) lawless findings of statutory aggravating circumstances,

and (3) findings relating to the judge's World War II experiences.

1. Findings of nonstatutory aggravating circumstances

a. Prior criminal activity

Fla. Stat. §921.141(6)(a) makes it a mitigating circumstance that "[t]he defendant has no significant history of prior criminal activity." The statute does not conversely make the presence of a significant history of prior criminal activity an aggravating circumstance. See Fla. Stat. §921.141(5); e.g., Maggard v. State, 399 So.2d 973, 977-78 (Fla. 1981). Nevertheless, Barclay's trial judge, the Honorable R. Hudson Olliff, made the following sentencing finding:

> "A. WHETHER DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY
>
> FACT:
>
> The defendant, Barclay, has an extensive criminal record of seven prior arrests. It shows that he had previously been on

> probation for the crime of uttering a forgery, and that subsequently that probation was revoked and he was sentenced to a term of six months County Jail. It also shows that he had previously been on five years probation for the crime of Breaking and Entering and Grand Larceny. There are also a number of misdemeanor crimes charged. (See PSI)
>
> CONCLUSION:
>
> There is an aggravating, rather than a mitigating circumstance as to the defendant Barclay because of his extensive record showing at least one prior felony conviction and one prior felony probation."

(J.A. 108-09).

Lest there be any doubt that the absence of the mitigating circumstance defined by §921.141(6)(a) is not "an aggravating ... circumstance," the Florida Supreme Court explicitly so held in Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). Barclay's counsel called Mikenas to Judge Olliff's attention (R.T. 61), to no avail. In addition, the Florida Supreme Court has repeatedly held

that, even as to prior convictions of violent felonies, which do constitute proper statutory aggravating circumstances under Fla. Stat. §921.141(5)(b) [see pages 37-38 infra], "mere arrests" do not qualify as convictions, Provence v. State, 337 So.2d 783, 786 (Fla. 1976), and any "charge [which has] ... not resulted in a conviction at the time of the [capital] trial" must be considered an improper "nonstatutory aggravating factor," Elledge v. State, supra, 346 So.2d at 1002.9/ If a defendant does have prior violent felony convictions, these must be proved by "evidence, either at trial or during the sentencing phase," in order to warrant their consideration as a statutory aggravating factor within §921.141(5)(b); their consideration "based solely on information contained in the

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9/ We shall see in note 24 and accompanying text infra, that the Florida Supreme Court itself has now clearly taken the position that consideration of nonstatutory aggravating circumstances as the basis for a death sentence is improper.

presentence investigation report" is forbidden. Williams v. State, 386 So.2d 538, 542-43 (Fla. 1980). Thus, on three distinct and unmistakable counts, Judge Olliff's finding that "[t]here is an aggravating, rather than a mitigating circumstance as to the defendant Barclay because of his extensive record" (J.A. 108) falls outside the contemplation of any statutory aggravating circumstance recognized by Florida law.

b. "Under sentence of imprisonment" and previous conviction of a violent felony

Two additional aggravating circumstances found by Judge Olliff should probably be classified as nonstatutory, since his own discussion of them negates their statutory elements. In each case, his findings follow an identical logic: The statutory aggravating circumstances do not exist [or have not been proved] factually; however, the facts show something resembling them; therefore, an

aggravating circumstance is found. Because these two findings do have some connection -- albeit no lawful connection -- to statutory aggravating factors, we consider them in the following section. They are items (2)(a) and (b), immediately below.

2. Lawless findings of statutory aggravating circumstances

a. Under sentence of imprisonment

Fla. Stat. §921.141(5)(a) makes it an aggravating circumstance that "[t]he capital felony was committed by a person under sentence of imprisonment." Judge Olliff found:

> "A. WHETHER THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER OF WHICH HE HAS BEEN CONVICTED
>
> FACT:
>
> The defendant, Barclay, was not under sentence of imprisonment at the time of the commission of this murder. His rap sheet shows seven prior arrests and he had previously been convicted of a felony and had been on felony probation.

CONCLUSION:

Although not imprisoned, the criminal record of Barclay is an aggravating circumstance."

(J.A. 120-21).

Like the fact that Barclay "had previously been convicted of a felony," the fact that he "had been on felony probation" was a thing of the past. Barclay was not on probation at the time of the present offense. Even if he were, the "under sentence of imprisonment" aggravating circumstance of §921.141(5)(a) would plainly not apply, since the Florida Supreme Court has construed the statute as meaning exactly what it says. To come within §921.141(5)(a), a defendant must be "under sentence of imprisonment" at the time of the capital felony, not under sentence of probation. E.g., Ferguson v. State, 417 So.2d 631, 636 (Fla. 1982); Peek v. State, 395 So.2d 492, 499 (Fla. 1981). Where, as Judge Olliff found here, a defendant "was not under

sentence of imprisonment at the time of the commission of his murder," no amount of cy pres reasoning can make his "criminal record ... an aggravating circumstance" (J.A. 121), as Judge Olliff then went on to find.10/ See Ford v. State, 374 So.2d 496, 501 n.1, 502 (Fla. 1979).

10/ Judge Olliff has sentenced five defendants to death, overriding a jury recommendation of life in four of the five cases. One of the four defendants in whose cases Judge Olliff ignored a jury's life recommendation committed suicide on death row before his appeal could be heard. Carnes v. State, No. 74-2024, 74-2131, Cir. Ct. 4th Jud. Cir., Duval County, Florida (Nov. 19, 1974); Miami Herald, July 4, 1975, at 9-A. One case was reversed by the Florida Supreme Court because of improper consideration of aggravating circumstances. Lewis v. State, 398 So.2d 432 (Fla. 1981). Two were affirmed. Barclay v. State, supra; Dobbert v. State, 375 So.2d 1069 (Fla. 1979).

Judge Olliff found the "under sentence of imprisonment" aggravating circumstance to be applicable in each of the five cases in which he imposed a death sentence, although it could properly be applied in only one of those five. Lewis v. State, supra, 398 So.2d at 438. In Dougan v. State, 398 So.2d 439, 441 (Fla. 1981) (McDonald, J., dissenting), Judge Olliff found that although Dougan was not under sentence of imprisonment, he had once been convicted of criminal contempt, and the aggravating circumstance therefore applied. In Dobbert v. State, supra, 375 So.2d at 1071, Judge Olliff found that although Dobbert was not under sentence of imprisonment, he had prevented his own imprisonment for child

b. Previous conviction of a violent felony

Fla. Stat. §921.141(5)(b) makes it an aggravating circumstance that "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Judge Olliff found:

"B. WHETHER THE DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON

FACT:

The defendant, Barclay, was previously convicted of breaking and entering with intent to commit the felonv of grand larceny. It is not known if such prior felony

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10/ (continued)

abuse by intimidating his victims and deceiving the authorities, and he had been convicted twice in the past. In Carnes v. State, supra, Judge Olliff found that although Carnes was not under sentence of imprisonment, he was out on bond on another charge at the time of the offense and therefore the aggravating cirucumstance applied. (A. 29a).

> involved the use or threat of violence in the crime. However, such crime can and often does involve violence or threat of violence - if there is a person in the building broken into.
>
> CONCLUSION:
>
> This is more of an aggravating than a negative circumstance."

(J.A. 121-22).

Once again, this cy pres finding of an aggravating circumstance is wholly lawless. The Florida Supreme Court has held that the aggravating circumstance defined by §921.141-(5)(b) also means what it says: only capital felonies or felonies which by definition involve the use or threat of violence (such as armed robbery) may be used in aggravation, unless there is proof beyond a reasonable doubt that the offense underlying the prior conviction actually involved the use or threat of violence. See, e.g., Mann v. State, 420 So.2d 578, 580 (Fla. 1982) (burglary convic-

tion may not be used as an aggravating factor); Spaziano v. State, 393 So.2d 1119, 1122-23 (Fla. 1981) ("nonviolent felony" conviction "must be excluded as [an] aggravating factor[]"); Ford v. State, supra, 374 So.2d at 501 n.1, 502 (conviction of breaking and entering to commit a felony may not be used as an aggravating factor). In Lewis v. State, 398 So.2d 432, 438 (Fla. 1981), the Florida Supreme Court expressly found that "two convictions of breaking and entering with intent to commit a felony" did not fall "within the meaning of this aggravating circumstance as defined by the statute," because the statute "refers to life-threatening crimes in which the perpetrator comes in direct contact with a human victim." Moreover, as we have noted at pages 31-32, supra, even if Barclay's prior breaking-and-entering offense had involved "the use or threat of violence in the crime" -- facts which Judge

Olliff conceded were "not known" (J.A. 121), i.e., unproved despite the State's obligation to prove the elements of every aggravating circumstance beyond a reasonable doubt, Williams v. State, supra, 386 So.2d at 542 -- Judge Olliff could not properly have found an aggravating circumstance under §921.141(5)(b) based upon the PSI alone, as he purported to do here.[11] Williams v. State, supra, 386 So.2d at 543.[12]

11/ Again, Judge Olliff found this aggravating circumstance to be present in all but one of the cases in which he sentenced a defendant to death. He found it applicable in Dougan v. State, supra, 398 So.2d at 441, although Dougan's only prior record involved a criminal contempt conviction with no evidence of violence. He found it applicable in Lewis v. State, supra, 398 So.2d at 438, although Lewis' prior record consisted of two breaking and enterings with intent to commit a felony, two escapes, one grand larceny, and one possession of a firearm by a convicted felon. (A. 49a-50a). The Florida Supreme Court disapproved the finding in Lewis, as noted on page 38, supra. Judge Olliff found it applicable in Carnes v. State, supra, although Carnes had never been convicted of any offense, but had been charged with a felony involving violence. (A. 30a). The Florida Supreme Court has held that charges not reduced to a conviction may not be used in aggravation. See page 31 supra.

12/ Compliance with the requirement of Williams would not have been superfluous in this case. The PSI relied

c. Great risk of death to many persons

Fla. Stat. §921.141(5)(c) makes it an aggravating circumstance that "[t]he defendant knowingly created a great risk of death to many persons." Recognizing the need to give this statutory aggravating circumstance a limiting construction which would assure some measure of consistency in its application, see Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979), the Florida Supreme Court has interpreted it to require (1) that the risk of death created be to "many" people, not just to one or two,[13] and (2) that there must be something in the

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12/ (continued)

upon by Judge Olliff to establish Barclay's record contains two different versions of that record, and a comparison of the two produces only confusion as to the actual number and nature of Barclay's encounters with the law. (A. 77a-79a).

13/ Blair v. State, 406 So.2d 1103, 1107-08, (Fla. 1981) (victim alone with defendant in house, child outside mowing lawn; held, "one or two" is not "many" persons); Odom v. State, 403 So.2d 936, 942 (Fla. 1981) (two women present with victim in house when defendant and accomplice fired shotguns through window; held, not

nature of the homicidal act itself (as in arson or the use of explosives), or in the defendant's conduct immediately surrounding the homicidal act, which created such a risk.[14]

13/ (continued)

"many" persons); Lewis (Robert) v. State, supra, 398 So.2d at 438 (same; Odom's accomplice); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981)("Although the shooting occurred in a rest area close to a major highway, it was done with pistols at close range where few, not many, suffered a risk of injury"); Johnson v. State, 393 So.2d 1069, 1073 (Fla. 1981) ("gun battle" in pharmacy, three other people present; held, not "many" persons); Williams v. State, supra, 386 So.2d at 541-42 (two people shot in bed; held, not "many" persons); Brown v. State, 381 So.2d 690, 696 (Fla. 1980) (robbery of shop, no indication of number of persons present; held, no proof that "many" persons were endangered); Lewis (Enoch) v. State, 377 So.2d 640, 646 (Fla. 1979) (victim's son and daughter in yard with victim when several shots were fired; held, not "many" persons); Dobbert v. State, supra, 375 So.2d at 1070 (defendant killed one child, physically abused three other children; held, not "many" persons); Kampff v. State, supra, 371 So.2d at 1009-10 (defendant fired five shots at victim in heavily traveled retail bakery where two others were present; held, not "many" persons).

14/ Bolender v. State, ___ So.2d ___, 1982 Fla. Law Wkly, SCO 490, 491 (No. 59,333) (Oct. 28, 1982) (other people present at scene of homicide, but defendant "never directed his actions toward any of the uninvolved people, and the means by which he inflicted the injuries, the gun, knife and baseball bat, were not used to endanger the lives of those individuals"); Ferguson v. State, 417 So.2d 639, 643, 645 (Fla. 1982) (eight people in house, each shot by defendant or accomplice

14/ (continued)

while bound, all but two killed; each homicide committed without risk to others; held, aggravating circumstance inapplicable); Tafero v. State, 403 So.2d 355, 362 (Fla. 1981) ("attempting to run a roadblock and being stopped by police gunfire does not constitute 'great risk' to 'many persons' as we defined those terms in Kampff"); Mines v. State, 390 So.2d 332, 337 (Fla. 1980) (defendant killed victim in van, then stopped passing motorist whom he hit with a machete; he fled in the car at high speed, took another woman hostage; finding of "great risk" vacated because only conduct surrounding the homicide of the victim, not after-occurring acts, may provide the basis for "great risk"); Dobbert v. State, supra, 375 So.2d at 1070 (murder by strangulation did not create "great risk" of death to others despite defendant's violent abuse of his several children at other times); Elledge v. State, supra, 346 So.2d at 1004 (defendant committed another homicide in another city after the victim was killed; "[i]t is only conduct surrounding the capital felony for which the defendant is being sentenced which properly may be considered" as a basis for a finding of "great risk").

We must acknowledge that this aggravating circumstance has been found in a handful of cases in which the standards enunciated by the Florida Supreme Court have not been followed. Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979) ("raging gun battle" but only three people present); Ford v. State, supra, 374 So.2d at 497, 500-02 n.1 (defendant threatened victims of robbery with gun; drove at high speeds creating a risk to others on the road) (compare with Tafero v. State, supra); Huckaby v. State, 343 So.2d 29 (Fla. 1977) (defendant convicted of sexual battery of a child, "sincere threats on the lives of his nine children and wife over the

Judge Olliff based his finding of the "great risk" aggravating circumstance[15] on

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14/ (continued)

course of many years" often resulting in actual harm considered sufficient (compare with Dobbert v. State, supra); Alvord v. State, 322 So.2d 533, 535 (Fla. 1975) (defendant murdered three woman by strangulation). In another small number of cases the Florida Supreme Court neither approved nor disapproved the finding of "great risk" by the trial court. Most of these cases were reversed on other grounds. Mikenas v. State, 367 So.2d 606 (Fla. 1978) (shoot-out during robbery of convenience store, number of people present not indicated; reversed because of consideration of nonstatutory aggravating circumstances); Washington v. State, 362 So.2d 658, 660, 663 (Fla. 1978) (four victims of robbery shot at close range while bound, one killed; death sentence affirmed); McCaskill & Williams v. State, 344 So.2d 1276, 1277, 1280 (Fla. 1977) (thirty-five to forty people in liquor store during hold-up, gun battle outside store as participants fled; death sentences reversed because jury recommendation of life was reasonable); Slater v. State, 316 So.2d 539, 540, 542 (Fla. 1975) (only one victim present, but threat existed to "any unknown persons who might have chanced into the office;" death sentence reversed because jury recommendation of life was reasonable); Proffitt v. State, 315 So.2d 460, 461, 467 (Fla. 1975) aff'd sub nom. Proffitt v. Florida, 428 U.S. 242 (1976) (victim in bed stabbed once in chest; wife sleeping beside him was pushed down by intruder when she awoke; death sentence affirmed).

15/ Yet again, Judge Olliff found this aggravating circumstance to be present in every case in which he imposed a death sentence. The finding was vacated by the Florida Supreme Court in both Lewis v. State,

the fact that the defendants passed over several other people before Orlando was selected as the victim (J.A. 122-23), and on the potential danger created by the "call for revolution and racial war" contained in the tapes sent to the news media several days after the homicide. (J.A. 123-24). Neither of these features of the case brings it properly within the Florida Supreme Court's usual construction of the aggravating circumstance:

(i) The fact that the defendants may have passed by and rejected other victims before finding and killing Orlando does not establish that Orlando's murder was committed

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15/ (continued)

supra, 398 So.2d at 438 and Dobbert v. State, supra, 398 So.2d at 1070. (See n.13 supra.) In Carnes v. State, supra, there were two people present in the house, although in another room, when the defendant shot the victim. (A. 13a-14a). Judge Olliff found the aggravating circumstance to be applicable because of the defendant's mistreatment of the two other people after the homicide was completed. (A. 31a-33a).

in such a fashion as to create a great risk of death to many persons. Dougan and his confederates set out to kill one person; they searched until they found one alone; they took him to a still lonelier spot, where he was the only person present in addition to the confederates at the time of the killing. To find that the 'casing' of other victims elsewhere prior to the homicide makes this aggravating circumstance applicable would be to find that every robber who passes several stores, every rapist who walks the street looking for a victim, has, by his very decision to avoid the presence of other people, created a "great risk of death to many people." If this reasoning were allowed, there would simply be "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Florida, 446 U.S. 420, 433 (1980) (plurality opinion).

(ii) Reliance on the "call to revolution" fares no better. It violates both the principle that behavior subsequent to the homicide (here the production of the tape recordings) cannot be considered as establishing the "great risk" aggravating circumstance, see note 14 supra, and the principle "that a person may not be condemned for what might have occurred. The attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance." White v. State, 403 So.2d 331, 337 (Fla. 1981) (emphasis in original).

We recognize that the Florida Supreme Court affirmed the finding of this aggravating circumstance in its opinion on the first of Barclay's two appeals. (J.A. 70; Barclay v. State, supra, 343 So.2d at 1271 n.4). In doing so, however, it made no effort to rationalize the finding by any logic which would render it consistent with the substantial body

of the court's own decisions that have interpreted the "great risk" statutory circumstance in a way which would make it inapplicable here. See notes 13 and 14 supra. The conclusionary statement that the finding is "well documented in the record before us," (J.A. 70; Barclay v. State, supra, 343 So.2d at 1271) therefore brings the case to this Court in a posture identical to Godfrey v. Georgia, supra, 446 U.S. at 432, where "the State Supreme Court [had] simply asserted that the verdict was 'factually substantiated,'" although not by any consistent reasoning that this Court could discern. What this implies at best is that the Florida Supreme Court itself has here -- and perhaps in some other cases as well, see the second paragraph of note 14 supra -- failed to observe with regularity its own professed interpretations of Fla. Stat. §921.141(5)(c). See also notes 16 and 17 infra. If these

failures can be taken together with their opposites as constituting the law of Florida, then Judge Olliff's finding of the "great risk" circumstance in Barclay's case was not indeed "lawless" in the sense of departing from the law; it was "lawless" in the more fundamental sense of lacking any law to follow or depart from.

d. Murder committed during a kidnapping

Fla. Stat. §921.141(5)(d) makes it an aggravating circumstance that "[t]he capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of ... any ... kidnapping ...." Judge Olliff found this aggravating circumstance (J.A. 125-27); and, at first blush, it might well seem to apply to the facts as he sets them forth. There are, however, two problems with this finding. First, the facts as related by Judge Olliff are nowhere to be found in the record. Second, the judge himself ruled

in the first instance that there was insufficient evidence of a kidnapping in this case.

Judge Olliff recites in his sentencing findings that the defendants "by force and/or threats kept [Orlando] ... in their car until they found an appropriate place for the murder." (J.A. 126). But the only witness who testified about the circumstances of the car ride, William Hearn, said that Orlando got in the car voluntarily, joked and exchanged pleasantries, and rode with the defendants without any threat or force being used. (T.T. 1369-72). There is no evidence that he protested in the slightest when Dougan ordered Hearn to pass the street which Orlando had designated as the one where they could buy some marijuana, and instead to proceed to another place where they could get drugs from a black woman. It was only when Dougan told Orlando to get out of the car at the site of the homicide that Orlando first indicated any

unwillingness to accompany the occupants of the car in which he had hitched a ride.

More importantly, Judge Olliff himself deemed the evidence insufficient to establish a kidnapping. During the charge conference at the close of the trial on guilt, all counsel and the trial judge agreed that the felony-murder provisions of the first and second degree murder statutes which included kidnapping as one of the predicate felonies would not be read to the jury because they were not applicable on the facts proved at trial. (T.T. 1912-1913, 1918-19). A felony-murder instruction was eventually given only because counsel for the defendants refused to waive an instruction on the lesser offense of third degree murder (murder during the course of a nonenumerated felony) (T.T. 1924-1975), and the instruction would be too confusing and incomprehensible unless the jury had received instructions on first and second

degree felony-murder spelling out the enumerated felonies. (T.T. 1925, 1975).

e. Murder committed to disrupt a governmental function, and "especially heinous, atrocious or cruel"

The two remaining aggravating circumstances found by Judge Olliff pose considerably greater difficulty in analysis, the first (that "the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws," Fla. Stat. §921.141(5)(g)) because the Florida Supreme Court has said so little about it that no clear standards emerge;[16/]

16/ The "hinder law enforcement" aggravating circumstance has been found by the trial court in twenty-five cases reviewed by the Florida Supreme Court on appeal. In all but eleven of the cases, the circumstance was applied to a factual situation in which a victim or bystander witness of a felony was then killed by the felon, apparently to avoid prosecution for the underlying felony. See Gilven v. State, 418 So.2d 996, 1000 (Fla. 1982); Ferguson v. State, 417 So.2d 639, 642-43 (Fla. 1982); Jones v. State, 411 So.2d 165, 168 (Fla. 1982); Smith v. State, 407 So.2d 894, 903 (Fla. 1981); Francois v. State, 407 So.2d 885, 890 (Fla. 1981); Blair v. State, 406 So.2d 1103, 1108-09 (Fla. 1981);

the second (that the offense was "especially

16/ (continued)

White v. State, 403 So.2d 331, 337-38 (Fla. 1981); Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Zeigler v. State, 402 So.2d 365, 376 (Fla. 1981); Williams v. State, supra, 386 So.2d at 541, 543; Clark v. State, 379 So.2d 97, 107 (Fla. 1979); Washington v. State, 362 So.2d 658, 665-66 (Fla. 1978); Meeks v. State, 339 So.2d 186, 190 (Fla. 1976); Meeks v. State, 336 So.2d 1142, 1143 (Fla. 1976). In six of the cases, the defendant killed a police officer, apparently to avoid arrest for another offense. Tafero v. State, 403 So.2d 355, 362 (Fla. 1981); Jacobs v. State, 396 So.2d 713, 715-16, (Fla. 1981); Holmes v. State, 374 So.2d 944, 945-46 (Fla. 1979); Ford v. State, supra, 374 So.2d at 497; Songer v. State, 365 So.2d 696, 698-99 n.2 (Fla. 1978); Raulerson v. State, 358 So.2d 826, 828 (Fla. 1978). In three cases the victim was a police informant, or slated to be a witness in a judicial proceeding against the defendant or his associates. Bolender v. State, _____ So.2d ____, 1982 Fla. Law Wkly, SCO 490 (No. 59,333) (Oct. 28, 1982); White v. State, 415 So.2d 719, 720 n.2 (Fla. 1982); Antone v. State, 382 So.2d 1205, 1208-09 (Fla. 1980). The remaining two cases are those of Barclay and Dougan, where the circumstance was based on the defendants' "call for revolution."

The Florida Supreme Court has often questioned the applicability of the "hinder law enforcement" aggravating circumstance to a particular case because of doubts whether the evidence was adequate to show that the defendant killed the victim to avoid arrest, rather than for some other reason. It has never vacated a finding of "hinder law enforcement," however, except to correct its use as an additional factor when the reasons for applying it were counted separately against the defendant under the "avoid arrest" aggravating circumstance, Fla. Stat. §921.141 (5)(e).

heinous, atrocious or cruel," Fla. Stat. §921.141(5)(h)) because the Florida Supreme Court has made so many contradictory statements about it that no clear standards emerge.[17] The dissenting justices in Dougan

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17/ The "especially heinous, atrocious or cruel" aggravating circumstance has generated a welter of unintelligible law. The Florida Supreme Court has vacated many findings of "especially heinous, atrocious or cruel", but it has also approved the finding in circumstances which seem factually indistinguishable. The narrowing construction given §921.141(5)(h) in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), and approved by this Court in Proffitt v. Florida, supra, 428 U.S. at 255-56, does not seem to have assisted in ensuring a consistent application of the circumstance.

The Florida Supreme Court has had no problem in cases where the victim was physically tortured, e.g., Gardner v. State, 313 So.2d 675 (Fla. 1975)(victim sustained over one hundred bruises, and injuries including genital mutilation); where death was caused by strangulation, e.g., Adams v. State, 412 So.2d 850 (Fla. 1982); or where a female victim was sexually assaulted before being murdered, e.g., Hitchcock v. State, 413 So.2d 741 (Fla. 1982). However, in a variety of other situations, too numerous to catalogue here, the Florida Supreme Court's results are not so comprehensible or consistent. A few examples relating to the grounds for the §921.141(5)(h) finding in Barclay's case will suffice to make the point.

Judge Olliff based his finding that the killing was "especially heinous, atrocious or cruel" on (1) the fact that the murder was premeditated and the victim was stalked, (2) the fact that the murder was motivated

17/ (continued)

by a desire for revolution and (3) the facts that the victim was "repeatedly stabbed by Barclay as he writhed in pain begging for mercy. Then Dougan shot him twice in the head." (J.A. 132-34).

The fact that the murder was premeditated exists, of course, in every case where a defendant is convicted of first degree murder on a theory of premeditation. Premeditation is one of the two grounds of liability for first degree murder in Florida, see Fla. Stat. §782.04-(1)(a); the other — felony murder — almost invariably triggers the separate aggravating circumstance defined by Fla. Stat. §921. 141(5)(d). If premeditation alone serves to make a murder "especially heinous, atrocious or cruel," then there are virtually no first degree murders which are not eo ipso candidates for the death penalty under either §921.141(5)(h) or (5)(d). Yet the Florida Supreme Court has persistently come out both ways on the question whether premeditation suffices under subsection (5)(h). Compare Harvard v. State, 414 So.2d 1032, 1033, 1036 (Fla. 1982) (defendant "stalked" and harassed ex-wife after their separation; homicide itself was committed by a single shotgun blast at ex-wife while she was in a car, death was instantaneous, with no evidence that she was aware of danger when killed; trial court's finding of "heinous, atrocious or cruel" circumstance based on fact that the crime was premeditated, calculated and "a cold-blooded execution" upheld) with Kampff v. State, supra, 371 So.2d at 1008, 1010 (defendant and wife were separated three years; defendant harassed her throughout the period; the homicide was committed by five shots at victim in a store, three of which struck and killed her; held, "heinous, atrocious or cruel" circumstance was not applicable). Compare Vaught v. State, 410 So.2d 147, 148, 151 (Fla. 1982) (robbery victim exposed defendant's face, defendant shot him five times; held, "heinous, atrocious or cruel" circumstance was applicable because

17/ (continued)

the murder was "inflicted in a cold, calculating, or 'execution-style' fashion") with Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979) (robbery victim shot twice while arms were raised in submissive position; held, "there is nothing to set this execution murder 'apart from the norm of capital felonies'"). Compare McCray v. State, 416 So.2d 804, 805, 807 (Fla. 1982) (defendant, angered by victim's actions during robbery, approached him and said, "This is for you motherf---er", then shot him three times; held, "heinous, atrocious or cruel" circumstance was not applicable); with Johnson v. State, 393 So.2d 1069, 1071, 1073, 1074 (Fla. 1980) (defendant, angered by fact that victim had shot at him during robbery, walked up to victim when victim ran out of bullets and said, "You think you're a smart son-of-a-bitch, don't you?" then shot him once in the chest; held, "heinous, atrocious or cruel" applicable to this "execution murder.")

There are no cases with which to compare Judge Olliff's second reason for finding the "heinous, atrocious, or cruel" circumstance in Barclay, i.e., the call for "revolution." However, this motive for a murder would seem irrelevant to the stated issue whether "the actual commission of the capital felony was ... [a] conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, supra, 283 So.2d at 9.

Judge Olliff's third reason, the stabbing and shooting of the victim, comes closer to the Dixon definition of "especially heinous, atrocious or cruel," but here again there are problems. One is that Judge Olliff's description of the homicide contradicts that given by the only eyewitness who testified, Hearn (see pages 49-50 supra), drawing instead upon the tapes, which Hearn said were exaggerated for propaganda purposes (T.T. 1403). While in an ordinary case the

17/ (continued)

resolution of such a "factual dispute" -- if it can be described as such — would, of course, be left to the trial judge, here there was another finder of fact involved, the jury; and the jury took a view of the facts that led it to recommend life for Barclay. Thus, under Florida law as the Florida Supreme Court has repeatedly declared it, Judge Olliff's findings of "facts suggesting a sentence of death" were required to be "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). See, e.g., Gilvin v. State, supra, 418 So.2d at 999; Williams v. State, supra, 386 So.2d at 543, and cases cited. In any event, even if the events surrounding the homicide are taken to be as they are described in Judge Olliff's sentencing order, it is far from clear that they would support a finding of an "especially heinous, atrocious or cruel" murder, consistently with the Florida Supreme Court's application of that statutory circumstance in numerous other cases than Barclay's. In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the victim was beaten to death with a nineteen inch breaker bar. The Florida Supreme Court saw "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Id. at 561. In Simmons v. State, 419 So.2d 316, 318-19 (Fla. 1982), the victim was bludgeoned to death with a roofing hatchet. The Florida Supreme Court vacated a finding that the offense was "especially heinous, atrocious or cruel." In Demps v. State, 395 So.2d 501, 503, 504, 506 (Fla. 1982), the victim died from multiple stab wounds, and lived for several hours before succumbing. Held: not "especially heinous, atrocious or cruel." In Lewis v. State, 377 So.2d 640, 646 (Fla. 1979), the victim was shot several times in the chest and back while trying to flee from the defendant. Held: not "especially heinous, atrocious or cruel." In Riley v. State, 366 So.2d 19,

v. State, 398 So.2d 439, 441 (Fla. 1981), believed the first to be inapplicable to the case, and the second to be applicable. We will dwell on neither here, because Elwood Barclay's death sentence must be vacated whether they were properly found or not. (See pages 83-107 infra.) We do not concede, however, the applicability of either circum-

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17/ (continued)

20, 21 (Fla. 1978), the owner of a store, his son, and the manager of the store were bound, gagged and shot in the head by the defendant. One survived. Held: not "especially heinous, atrocious or cruel." In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), the victim was allowed to "languish, without assistance or the ability to obtain assistance." Held: not "especially heinous, atrocious or cruel." Nothing in the stabbing or shooting of Stephen Orlando serves to distinguish these cases.

A final comment on Judge Olliff's finding of the §921.141(5)(h) circumstance is in order. Judge Olliff has found each of the cases in which he sentenced a man to death to be an "especially heinous, atrocious or cruel" crime. In each he described his years of experience in criminal justice, and his experiences on the battlefields of World War II. In each he pronounced that although, because of those experiences he was not easily shocked, the offense before him shocked him. (See J.A. 50-51, 137-39; A. 40a-41a, 74a-75a; Dobbert v. Florida, 432 U.S. 282, 296 n.9 (1977)).

stance, or the sufficiency of the Florida Supreme Court's interpretation and application of either circumstance to satisfy this Court's concern against "standards so vague that they would fail adequately to channel ... sentencing decision patterns ... with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur," Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976); see Godfrey v. Georgia, supra, 446 U.S. at 428.

3. An additional nonstatutory aggravating circumstance, and its relationship to Judge Olliff's personal experience

Judge Olliff did not rest his sentence of death for Elwood Barclay solely upon the aggravating circumstances discussed above. No fair reading of his sentencing findings can escape the conclusion that he sentenced Barclay to die in large measure because of his personal abhorrence for the

motive which prompted the killing of Stephen Orlando: racial hatred. Although the fact that this killing was racially motivated might certainly have been considered as a proper aggravating circumstance under a statute making it one (cf. Cal. Penal Code §190.2-(a)(16)), the plain fact is that the Florida legislature chose not to include such a circumstance in its statutory scheme. Under that statute, by which Florida sentencing judges are supposed to be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision," Gregg v. Georgia, supra, 428 U.S. at 192, it nowhere appears that they are to consider whether a victim is killed because the defendant hates whites, or blacks, or women, or any other class of persons, however abhorrent the bigotry involved.

In his dissent from the original affirmance of Barclay's death sentence, Justice (now Eleventh Circuit Judge) Hatchett found the trial judge's consideration of factors outside the record, "incuding his own personal experiences," to have upset the balance mandated by the statute. (J.A. 76; Barclay v. State, supra, 343 So.2d at 1272). Justice Hatchett refers, of course, to Judge Olliff's lengthy exhortation about his experiences during World War II in Nazi Germany, a sample of which follows:

> "Similar sentiments were violently uttered on another continent in our own recent history. During World War II, I was among some of the first American Combat Parachute Infantry Soldiers to enter Nazi Germany, and I was present at the liberation of several slave labor and concentration camps. Particularly, the concentration camps made a vivid and lasting impression upon me. I saw human corpses stacked like cord wood - to be buried or burned in the ovens.
>
> "Those people had been murdered in various ways, by starvation, torture, gassing or they were shot. They were

> murdered because they were all guilty of the same crime - they were different from those people who murdered them. They were either of a different race, culture, religion or political belief. That was their only crime - they were different. Surely we must have learned some lasting lesson from that tragic holocaust."

(J.A. 92-93).

And again:

> "My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. I, like so many American Combat Infantry Soldiers, walked the battlefields of Europe and saw the thousands of dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial and religious extermination."

(J.A. 137-38).[18] (See also J.A. 4-5, 50).

It is obviously easier for one to empathize with Judge Olliff's lasting horror at the Holocaust than to understand Barclay's violent bigotry against white people. Never-

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18/ It should be noted that in each of the sentencing orders in each of the five cases in which Judge Olliff sentenced a man to death, he commented upon his experience in World War II and the horror of that experience. (A. 40a-41a, 75a, and Dobbert v. Florida, 432 U.S. 282, 296 n.9 (1977).

theless, noble emotions are no exception to the rule that legislative standards for capital sentencing are required precisely because "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion). The manifest implication of Judge Olliff's reliance upon his experience in World War II is that Elwood Barclay's death sentence was to depend upon the capricious accident of his trial judge's history, rather than on his own. Notably, Barclay's jury recommended life for him, although the ugly motive for his crime was spread indelibly across the trial record, no less obvious to the jury than the judge. The contrast of the jury's verdict with Judge Olliff's sentence surely reflects in no small part the fact that the jurors were instructed

to consider only the statutory aggravating circumstances, while he felt free to add others of his choosing.

B. A Sentencing Process So Lawless As The One Which Condemned Barclay To Die Violates the Eighth and Fourteenth Amendments

Little argument seems necessary to demonstrate that a procedure for condemning men to die upon the basis of an ad hoc concatenation of nonstatutory aggravating circumstances and of "statutory" circumstances twisted into shapelessness violates the Eighth Amendment. The essence of this Court's decisions applying the Amendment to the process of capital sentencing has been the "insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). "Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be

inflicted in an arbitrary and capricious manner." Gregg v. Georgia, supra, 428 U.S. at 188.

The Court has never deviated from this basic principle.[19] "Furman ... require[d] that ... sentencing discretion [in capital cases] ... be 'directed and limited,' ... so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a 'meaningful basis for distinguishing the ... cases in which it is imposed from ... the many cases in which it is not.'" Lockett v. Ohio, 438 U.S. 586, 601 (1978)(plurality opinion).

19/ See, e.g., Zant v. Stephens, ___ U.S. ___, 72 L.Ed.2d 222, 225-26 (1982):

> "In Gregg v. Georgia, ... we upheld the Georgia death penalty statute because the standards and procedures set forth therein promised to alleviate to a significant degree the concern of Furman ... that the death penalty not be imposed capriciously or in a freakish manner. We recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the statute and reviewing

> "This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.' .... It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"

Godfrey v. Georgia, supra, 446 U.S. at 428.

The role of statutory aggravating circumstances in channelling the sentencer's discre-

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19/ (continued)

capital sentences consistently with this concern."

Hopper v. Evans, ___U.S. ___, 72 L.Ed.2d 368, 373 (1982):

> "Our holding in Beck [v. Alabama, 447 U.S. 625 (1980)], like our other Eighth Amendment decisions in the past decade, was concerned with insuring that sentencing discretion in capital cases is channelled so that arbitrary and capricious results are avoided."

tion is obvious. Statutory aggravating circumstances serve three indispensable, interrelated functions in this regard:

First, because "the provision of relevant [sentencing] information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used," Gregg v. Georgia, supra, 428 U.S. at 192, statutory aggravating circumstances provide the sentencer "with standards to guide its use of the information," id. at 195. They are the primary instrument through which, "[u]nder Florida's capital-sentencing procedures, ... trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." Proffitt v. Florida, supra, 428 U.S. at 253.

Second, statutory aggravating circumstances supply the necessary predicate for "meaningful appellate review ... to ensure

that death sentences are not imposed capriciously or in a freakish manner." Gregg v. Georgia, supra, 428 U.S. at 195. "[T]o the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida, 'to determine independently whether the imposition of the ultimate penalty is warranted.'" Proffitt v. Florida, supra, 428 U.S. at 253. It is the specification of a fixed roster of aggravating circumstances, whose legal applicability and evidentiary support can be assessed objectively on appeal, which alone can guarantee "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" Id. at 251, quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Statutory

aggravating circumstances are, in short, the basic tool by which capital sentencing has been brought back within the traditions of "a legal system ... operated by following prior precedents and fixed rules of law." Gregg v. Georgia, supra, 428 U.S. at 193.

Third, statutory aggravating circumstances are the means by which capital sentencing is kept "circumscribed by ... legislative guidelines." Id. at 207. They furnish the sentencer with "guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." Id. at 192. They thus assure that the death penaty will be used only for the purposes, and within the boundaries, set for it by the regularly constituted lawmaking and policymaking organ of the State, so as to avoid the evil against which the Eighth Amendment was historically addressed:

"Severe punishments not legally authorized and not within the jurisdiction of the courts to impose." Furman v. Georgia, 408 U.S. 238, 376 (1972)(dissenting opinion of Chief Justice Burger), citing Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CALIF. L. REV. 839, 852-60 (1969).20/

When the death penalty is meted out on the basis of an open-ended inventory of nonstatutory aggravating circumstances, limited only by the individual sentencing judge's imagination, all of these features of a regular, evenhanded, lawful administration of capital punishment are fatally undermined. A nonstatutory factor that strikes one judge as aggravating may be ignored or differently assessed by another; the same judge may overlook a factor in a

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20/ This history is also reviewed in Brief for Petitioner in Fowler v. North Carolina, No. 73-7031, at pages 27-39.

dozen cases before awakening to its significance in the thirteenth. This is the paradigm of arbitrariness. It is the rule of men, not Law. But "[w]hen we consider the nature and the theory of our institutions of government, ... we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.... [T]he law is the definition and limitation of power.... For, the very idea that one man may be compelled to hold his life ... at the mere will of another, seems to be intolerable in any country where freedom prevails.... " Yick Wo v. Hopkins, 118 U.S. 356, 369-70 (1886).

It was the purpose of Furman and its progeny to bring capital sentencing within the time-honored rule of Law. See, e.g., Gregg v. Georgia, supra, 428 U.S. at 192-93. It was the promise of Proffitt that the rule

of Law would be observed in capital sentencing in Florida -- that Florida's statutory procedures would serve "to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." Proffitt v. Florida, supra, 428 U.S. at 260. Both the purpose and the promise are defeated by a regime where life or death depends on sentencing judges' ability and willingness to make up aggravating circumstances as they go along. "The most important safeguard presented in Fla. Stat. §921.141 ... is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973); Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976).21/

21/ Following Lockett v. Ohio, supra, Songer v. State, 365 So.2d 696 (Fla. 1978), and the 1979 amendment to the Florida statute (see note 7 supra), the full brunt of regularizing the capital sen-

> "[P]ermitting the [sentencer] ... to consider whatever evidence of nonstatutory aggravating circumstances the prosecution might desire to present or the [sentencer] ... might discern in the testimony opens too wide a door for the influence of arbitrary factors on the sentencing determination.... [S]anctioning consideration of statutory aggravating factors plus anything else the [sentencer] ... determines to be aggravating ... broadens ... discretion rather than channels it and obscures any meaningful basis for distinguishing cases in which the death penalty is imposed from those in which it is not."

Henry v. Wainwright, 661 F.2d 56, 59 (5th Cir. 1981)(emphasis in original), vacated on other grounds, ___ U.S. ___, 73 L.Ed.2d 1326 (1982), adhered to on remand, 686 F.2d 311 (5th Cir. 1982).22/

21/ (continued)

tencing process and assuring consistency in its results now falls, of course, on the aggravating circumstances alone.

22/ Accord, Bell v. Watkins, ___ F.2d ___, No. 81-4358, slip op. at 962-65 (5th Cir. Dec. 6, 1982); Proffitt v. Wainwright, 685 F.2d 1227, 1266-67 (11th Cir. 1982); Jordan v. Watkins, 681 F.2d 1067, 1082 reh. and reh. en banc denied, 688 F.2d 395 (5th Cir. 1982); State v. Bartholomew, ___ P.2d ___, No.

The same unleashing of discretion to the vagaries of caprice results when "statutory" aggravating circumstances are allowed to be manipulated to suit the sentencing result desired. Findings of statutory aggravating circumstances made by expanding the definitions of those circumstances ad hoc to fit the facts, or by inventing facts to fit the definitions, simply flout the constitutional command of guided discretion. This too is quintessentially arbitrary. "Even in applying permissible standards, officers of a State cannot [justify their conduct by those standards] ... when there is no basis for their finding that [the standard applies] ..., or when their action is invidiously discriminatory." Schware v. Board of Bar

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22/ (continued)

48346-9, slip op. at 24-30 (Sup. Ct. Wash. Nov. 24, 1982) (en banc); but see Harris v. Pulley, ___ F.2d ___, No. 82-5246 (9th Cir. Sept. 16, 1982).

Examiners, 353 U.S. 232, 239 (1957). This Court recognized as much by invalidating the death sentence imposed under a rubber yardstick in Godfrey v. Georgia, supra. There it was unclear whether a baseless factual finding had been made to bring Godfrey within an adequately defined statutory aggravating circumstance or whether the definition of the circumstance had been enlarged sub silentio to bring Godfrey within it; but the constitutional consequence was the same. "The circumstances of this case ... do not satisfy the criteria laid out by the Georgia Supreme Court itself," 446 U.S. at 432, and Godfrey's sentence was therefore unconstitutional -- whether regarded as the result of arbitrary factfinding or as the result of "'standards so vague that they would fail adequately to channel ... sentencing decision patterns,'" id. at 428.

Indeed, the Florida Supreme Court has essentially acknowledged all of these points. Because of the key role that the statutory aggravating circumstances play in the constitutionality of Florida's capital sentencing system, that court has attempted to preserve the integrity of the system by confining consideration of aggravating circumstances to those enumerated in the statute, and by circumscribing the application of the statutory aggravating circumstances so as to avoid an overbroad or vague construction. Despite its early 4-to-3 decision in Sawyer v. State, 313 So.2d 680 (Fla. 1975), affirming a death sentence based on nonstatutory aggravating circumstances,[23/] the Florida

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23/ Sawyer's death sentence was subsequently reduced to life by the trial court on a motion to reduce sentence under Fla. R. Crim. Proc. 3.800. Sawyer v. State, No. 73-1001-C (Cir. Ct. 11th Jud. Cir., Dade Cty, Fla., Aug. 6, 1976). The Florida Supreme Court has since ruled that such motions are

Supreme Court has since held consistently that nonstatutory aggravating circumstances may not be considered in the imposition of a death sentence.[24] The use of non-

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23/ (continued)

unavailable to death-sentenced defendants. In re Florida Rules of Criminal Procedure, 343 So.2d 1247, 1264 (Fla. 1977).

24/ See, McCampbell v. State, ___ So.2d ___, 1982 Fla. Law Wkly, SCO 492 (No. 57,026) (Oct. 28, 1982) (trial judge should not have relied upon the failure of defendant to acknowledge guilt or demonstrate remorse, and on the suspected procurement of perjurious alibi testimony because those factors are not "statutorily-enumerated aggravating circumstance[s]"); Blair v. State, 406 So.2d 1103, 1108 (Fla. 1981)(premeditated design); Odom v. State, 403 So.2d 936, 942 (Fla. 1981) (arrests and charges not culminating in criminal convictions); Perry v. State, 395 So.2d 170, 174-75 (Fla. 1980) (pending criminal charges for which there was no conviction); Spaziano v. State, 393 So.2d 1119, 1122-23 (Fla. 1981) (convictions for nonviolent offenses and misdemeanors, and charges for which there was no conviction); Brown v. State, 381 So.2d 690, 695-96 (Fla. 1980)(premeditated design); Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979) ("heinousness" of attempted murders of others during incident in which victim was killed); Miller v. State, 373 So.2d 882, 885 (Fla. 1979)(defendant's incurable and dangerous mental illness coupled with possibility of future release if a life sentence were imposed); Menendez v. State, 368 So.2d 1278, 1281 & n.12 (Fla. 1979) (defendant looted body,

statutory aggravating factors was found to be unacceptable, not only because it "indicates that the weighing process dictated by statute was not followed," Mikenas v. State, 367 So.2d 606, 610 (Fla. 1979), but more importantly because it affronts the purpose of the statute "to

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24/ (continued)

pointed gun at witness who fled, and showed no signs of remorse); Mikenas v. State, supra, 367 So.2d at 610 (substantial history of prior nonviolent criminal activity considered as an aggravating circumstance, rather than merely precluding consideration of a mitigating circumstance); Riley v. State, 366 So.2d 19, 21 & n.2 (Fla. 1978)(no remorse; prolonged premeditation); Elledge v. State, supra, 346 So.2d at 1102 (criminal charge for which there was not yet a conviction); Huckaby v. State, 343 So.2d 29, 33 & n.11 (Fla. 1977)(defendant was a "danger and menace to society" and had a "propensity to commit rape"); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977)("the specified statutory circumstances are exclusive; no others may be used [to impose a death sentence]"); Provence v. State, 337 So.2d 783, 786 (Fla. 1976)("mere arrests or accusations" not reduced to criminal convictions). In two other cases nonstatutory aggravating circumstances were found by the trial court but not commented upon by the Florida Supreme Court. Proffitt v. Florida, 315 So.2d 461, 466 (Fla. 1975), aff'd sub nom. Proffitt v. Florida, 428 U.S. 242 (1976) (death sentence affirmed); Thompson v. State, 328 So.2d 1, 6 (Fla. 1976)(death sentence reversed on other grounds).

meet the constitutional infirmity of capital sentencing procedures explored in Furman v. Georgia [by] ... limit[ing] the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible," Provence v. State, supra, 337 So.2d at 786. Similarly, the Florida Supreme Court has both interpreted statutory aggravating circumstances and reviewed the factual underpinnings of findings of them with a view to preventing their indiscriminate application. E.g., Menendez v. State, 368 So.2d 1278, 1281-82 (Fla. 1979); Riley v. State, 366 So.2d 19, 21 (Fla. 1979).

These restrictions upon the "unbridled exercise of judicial discretion" are no less important in cases where one unquestionably valid statutory aggravating circumstance has been found. The Florida Supreme Court has forbidden the consid-

eration of nonstatutory aggravating circumstances in such cases, as well as in cases where no valid statutory aggravating circumstance is proved.25/ It is true that the Florida Supreme Court has not invariably found that a trial judge's consideration of nonstatutory or improperly applied statutory aggravating circumstances was reversible error -- a point to which we shall return in Part II of this Brief,

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25/ E.g., Moody v. State, 418 So.2d 989, 995 (Fla. 1982)(although the "trial court's finding of the aggravating circumstances that this capital felony was atrocious, heinous, or cruel and that it was committed for pecuniary gain are [sic] entirely appropriate as evidenced by the record ..., the trial court erroneously considered an aggravating circumstance not supported by the evidence ... "); Menendez v. State, supra, 368 So.2d at 1281, 1282 ("three ... aggravating circumstances found by the trial judge should not have been considered, since they are outside the list of factors enumerated in our death penalty statute"; these "findings are stricken," despite the fact that there is "one properly found aggravating circumstance"); Riley v. State, 366 So.2d at 21-22 (two "aggravating circumstances clearly must be disregarded as not having been listed in Section 921.141(5)," although two other statutory aggravating circumstances were properly found).

infra. But it has recognized that any such consideration is error, even in a case where one or more valid statutory aggravating circumstances have been established.

This plainly must be the Eighth Amendment rule as well. For the thrust of all of this Court's Eighth Amendment decisions in the past decade is to insure a proper chanelling of discretion in the process of selecting, from among convicted defendants eligible for the death penalty, those who must actually die. E.g., Gregg v. Georgia, supra, 428 U.S. at 197-99. A narrowing of the class of defendants who are eligible for "consideration as a candidate for the death penalty," id. at 199, does not obviate constitutional concern about the method for choosing among those who remain candidates. E.g., Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977) (per curiam); Roberts (Stanislaus) v.

Louisiana, 428 U.S. 325, 331-36 (1976).

The finding of a valid statutory aggravating circumstance functions to make the defendant a candidate. Such a finding is made in the cases of all candidates, and therefore cannot serve to distinguish among them. If, upon the finding of a valid statutory aggravating circumstance, the door is thrown open to consideration of a witch's brew of nonstatutory aggravating circumstances and lawlessly applied statutory aggravating circumstances in addition to the valid one, then the ultimate selection among death-eligible candidates is left exactly where Furman found it. This is particularly true in Florida, where at least one statutory aggravating circumstance is almost universally present in every first degree murder case. First degree murder requires a finding of either premeditation or a killing in the course of

several enumerated felonies (Fla. Stat. §782.04(1)(a)); enumerated felony-murder is (with one minor exception) always an aggravating circumstance under Fla. Stat. §921.141(5)(d); and premeditated murder was found by Judge Olliff -- and has sometimes been found by the Florida Supreme Court -- adequate to trigger the statutory aggravating circumstance of §921.141(5)(h). See note 17 supra.[26/]

The Eighth Amendment requires that a "capital sentencing scheme ... provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" Godfrey v. Georgia, supra, 446 U.S. at 427, quoting Gregg v. Georgia, supra, 428 U.S. at 313 (opinion of Justice White). No such

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26/ In addition, under the 1979 amendment of the Florida statute described in note 7 supra, premeditated murder will ordinarily trigger the aggravating circumstance of §921.141(5)(i).

basis is provided by a system which casts the runes of lawful, lawless statutory, and nonstatutory aggravating circumstances, stirs them with the sentencing judge's most intense emotive recollections, and reads the defendant's death in them. Proffitt anticipated that under the Florida statute, "after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death." Proffitt v. Florida, supra, 428 U.S. at 259. Elwood Barclay waits for this kind of sentencing process.

II. THE UNCONSTITUTIONAL PROCESS THAT PRODUCED BARCLAY'S DEATH SENTENCE REQUIRES ITS REVERSAL

The question remains whether Barclay is entitled to the reversal of his death sentence, and to a new and constitutionally proper sentencing determination at the

trial level, because of the Eighth Amendment violations shown by this record. That question implicates Florida's "Elledge rules," which we first describe and then discuss below.

A. The "Elledge rules"

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Florida Supreme Court announced a pair of rules to govern its review of cases in which a death sentence is marred by the trial judge's improper consideration of nonstatutory or legally erroneous statutory aggravating circumstances. First, reversal is required in such cases, despite the presence of one or more valid statutory aggravating circumstances, if a mitigating circumstance was found. That is so, the court reasoned, because the Florida statute requires a weighing of valid aggravating circumstances against mitigating circumstances, and

"regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Id. at 1003.[27] Second,

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27/ Accord, Moody v. State, 418 So.2d 989, 995 (Fla. 1982) (finding that murder was committed during arson, Fla. Stat. §921.141(5)(d) was not supported by the evidence; death sentence vacated and case remanded for resentencing); Blair v. State, 406 So.2d 1103, 1108-09 (Fla. 1981)(improper finding of nonstatutory aggravating circumstance of "premeditation;" "especially heinous, atrocious or cruel" and "great risk of death" aggravating circumstances were misapplied; death sentence vacated and life sentence imposed after comparing case to others); Lewis v. State, 377 So.2d 640, 646-47 (Fla. 1979) ("great risk of death" and "especially heinous, atrocious or cruel" aggravating circumstances were erroneously applied; death sentence vacated and case remanded for resentencing); Lucas v. State, 376 So.2d 1149, 1153-54 (Fla. 1979) ("especially heinous, atrocious or cruel" aggravating circumstance was misapplied; death sentence vacated and case remanded for resentencing); Fleming v. State, 374 So.2d 954, 957-59 (Fla. 1979) (same fact was improperly used to support two aggravating circumstances; "especially heinous, atrocious or cruel" aggravating circumstance was misapplied; death sentence vacated and case remanded for resentencing); Menendez v. State, 368 So.2d 1278, 1281-82 (Fla. 1979) (improper findings of

reversal is not required if one or more valid aggravating circumstances have been

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27/ (continued)

three nonstatutory aggravating circumstances; "especially heinous, atrocious or cruel" and "avoid arrest" aggravating circumstances were misapplied; death sentence vacated and case remanded for resentencing); Mikenas v. State, supra, 367 So.2d at 610 (nonstatutory aggravating circumstance found; death sentence vacated and case remanded for resentencing); Riley v. State, 366 So.2d 19, 21-22 (Fla. 1978) (same fact was improperly used to support two aggravating circumstances; improper findings of two nonstatutory aggravating circumstances; "especially heinous, atrocious or cruel" aggravating circumstance was misapplied; death sentence vacated and case remanded for resentencing).

Where the sole sentencing error committed was a different and less serious one known as "doubling" — i.e., the use of the same fact to support two aggravating factors such as robbery, Fla. Stat. §921.141 (5)(d), and pecuniary gain, Fla. Stat. §921.141(5)(f) — the Florida Supreme Court has held that reversal is not invariably required. Vaught v. State, 410 So.2d 147, 148-49 (Fla. 1982); Hargrave v. State, 366 So.2d 1, 4 (Fla. 1978). Also, in Brown v. State, 381 So.2d 690, 696 (Fla. 1980), the first Elledge rule was found not to require reversal where the only mitigating circumstance, the fact that the defendant was twenty-three years old at the time of the offense, had been explicitly assessed by the trial judge as having "only 'some minor significance.'" Zeigler v. State, 402 So.2d 365, 376-77 (Fla. 1981), appears to be based on the premise that the trial judge made a similar finding by implication.

found, "where there are no mitigating circumstances. The absence of mitigating circumstances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute." Id. at 1002-03 (emphasis in original).

B. Nonarbitrary Application Of The First Elledge Rule Requires the Vacation of Barclay's Death Sentence

In Elledge, it did "not expressly appear from the specific findings of fact that the trial judge found the existence of mitigating circumstances. His written findings expressly negate the existence of certain mitigating circumstances." Id. at 1003. But because his sentencing order recited that, "'after weighing the aggravat-

ing and mitigating circumstances,'" he had reached the "'opinion that insufficient mitigating circumstances exist to outweigh the aggravating circumstances,'" ibid., the Florida Supreme Court concluded that he "implicitly found some mitigating circumstances to exist," ibid. (emphasis in original).

In Barclay's case, there were two findings regarding the presence of mitigating circumstances. The first, by the jury, was a finding that "sufficient mitigating circumstances do exist which outweigh any aggravating circumstances...." (S.T. 180). The second, by Judge Olliff, was a finding that there are no mitigating circumstances present in the case.[28] (J.A. 107-20). How are the Elledge rules to be applied

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28/ Judge Olliff has never found a single mitigating circumstance in any of the cases in which he sentenced a defendant to death, including all four cases where the jury recommended life. (J.A. 17-32, 107-20; A. 17a-28a, 50a-60a).

in this situation?

The Florida Supreme Court answered that question in Lewis v. State, 398 So.2d 432 (Fla. 1981), a case indistinguishable from Barclay's. In Lewis, the trial judge found four statutory aggravating circumstances and "no mitigating circumstances." Id. at 438. The Florida Supreme Court upheld one aggravating circumstance and found three unsupported by the record. Ibid. It then disposed of the appeal as follows:

> "The jury recommended a sentence of life imprisonment. The trial court judge's sentencing findings contain a discussion of each of the statutory mitigating circumstances and a statement that none of them are applicable to the facts of this case. However, the jury is not limited, in its evaluation of the question of sentencing, to consideration of the statutory mitigating circumstances. It is allowed to draw on any considerations reasonably relevant to the question of mitigation of punishment. Lockett v. Ohio, 438 U.S. 586 ... (1978); Songer v. State, 365 So.2d 696 (Fla. 1978) .... Since three of

> the trial court's four aggravating circumstances have been found to be erroneous, we remand the case for reconsideration of sentence by the trial court judge so that the single established aggravating circumstance can be weighed against the recommendation of the jury."

Ibid.

Lewis would thus appear to control the present case,[29] except for the fact that

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29/ Barclay's jury could properly take account of several nonstatutory mitigating circumstances "reasonably relevant to the question of mitigation of punishment" within Lockett and Lewis, supra. For example, Barclay was gainfully employed and the father of several children. (See page 18 supra.) Although Barclay was a principal to the homicide, he did not inflict any mortal wounds and was subservient to Dougan, who planned, directed and committed the murder. (T.T. 1356-61, 1371-2, 1385). See the dissent of Justice Boyd in Barclay v. State, supra, 343 So.2d at 1242 (J.A. 74-75). The Florida Supreme Court has often justified imposing a death sentence on the dominant figure in a homicide while other participants, both principals and accessories, receive lesser sentences. See, e.g., Bolender v. State, ___ So.2d ___, 1982 Fla. Law Wkly, SCO 490 (No. 59,333) (Oct. 28, 1982) (coparticipant received concurrent life sentences, defendant's death sentence justified because he "acted as the leader and organizer ... and inflicted most of the torture leading to the victims' deaths"); Messer v. State, 403 So.2d 341 (Fla. 1981) (coparticipant sentenced to thirty years; defendant's death sentence justified because he was the leader and inflicted the

the Florida Supreme Court has reached an apparently contrary result in several other cases, without attempting to reconcile them with Lewis or vice versa. See Bolender v.

29/ (continued)

mortal blows, while accomplice inflicted only nonfatal wounds); Tafero v. State, 403 So.2d 355, 362 (Fla. 1981) (coparticipant received life sentence; defendant's death sentence justified because he "did the shooting and probably was the leader of the group"); Jackson v. State, 366 So.2d 752, 757 (Fla. 1978) (coparticipant received life sentence; defendant's death sentence justified because he was the "dominating" actor); Salvatore v. State, 366 So.2d 745, 751-52 (Fla. 1978) (coparticipant sentenced to term of years; defendant's death sentence justified because he formulated the plan to kill and was the actual perpetrator, accomplice refrained from beating the victim until after the defendant struck the first blows); Smith v. State, 365 So.2d 704, 705, 708 (Fla. 1978) (coparticipant sentenced to concurrent life sentences; defendant's death sentence justified because he originated the idea of setting the car on fire, which killed the victim, directed the coparticipant to ignite the car, and generally "dominated" the coparticipant that evening); Meeks v. State, 339 So.2d 186 (1976) (coparticipant received life sentence; defendant's death sentence justified because defendant inflicted mortal wounds and "was the dominant figure in this criminal episode").

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29/ (continued)

The jury might additionally have considered that death would be an excessive and disproportionate punishment for Barclay when compared with the prison sentences of Hearn, Crittendon and Evans, who were all principals to the homicide. According to Hearn's testimony, all five young men knew what Dougan had planned by the time they picked Orlando up, and none protested the plan. (T.T. 1359-61). Although there is no evidence that either Hearn or Crittendon physically participated in the homicide, Hearn provided the murder weapon. (T.T. 1356-58, 1550). Evans was said to have stabbed the victim with the pocketknife, as did Barclay. (T.T. 1183). The jury obviously differentiated the relative culpability of the participants by finding Crittendon and Evans guilty of second degree murder, recommending life for Barclay, and reserving the death sentence for Dougan. To the extent that a desire for retribution is involved in such a decision, it may well be that the jury believed the forfeit of one life for the life of the victim was sufficient expiation.

Nor can this jury be suspected of having had any substantial misgivings about the death penalty. To the contrary, during jury selection seven jurors were excused for cause because of their conscientious scruples against the death penalty (V.T. 490, 533, 538, 546, 579, 586-87, 594), and the prosecutor used his peremptory strikes to eliminate all other prospective jurors who had expressed any hesitation about imposing a death sentence, but who could not be excused for cause under the standards enunciated in Witherspoon v. Illinois, 391 U.S. 510 (1968) (V.T. 198-207, 212, 215; 234-35; 237-40; 299-300, 366; 432-37; 492-94, 502-03; 494-96, 502-03; 562-64, 568).

State, ___ So.2d ___, 1982 Fla. Law Wkly, SCO 490 (No. 59,333) (Oct. 28, 1982); White v. State, 403 So.2d 331, 336-40 (Fla. 1981); Johnson v. State, 393 So.2d 1069, 1072-74 (Fla. 1980); Dobbert v. State, 375 So.2d 1060, 1070-71 (Fla. 1979). This is a not infrequent phenomenon in Florida capital appeals, where many of the protective pronouncements which we have previously described seem to be turned on and off from case to case without notice or explanation. See notes 14, 17 supra.30/ While this might do if no federal constitutional rights were involved, such a practice cannot justify a state appellate court's episodic refusal to vindicate federal claims. See, e.g., Barr v. City of

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30/ Where explanations have been offered for divagations, they have sometimes been less convincing than their absence. See, e.g., Songer v. State, 365 So.2d 696, 700 (Fla. 1978), holding that Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976), did not say what any fair reading of Cooper makes it inescapably plain that Cooper did in fact say.

Columbia, 378 U.S. 146, 149-50 (1964) and cases cited; N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 455-58 (1958). It should particularly not be permitted where the substance of the federal claim in issue is a right to have the penalty of death administered "with reasonable consistency, or not at all," Eddings v. Oklahoma, supra, 455 U.S. at 112, and where the protection of that right depends upon death sentences being "conscientiously reviewed by a court which ... can assure consistency, fairness, and rationality in the evenhanded operation of the state law," Proffitt v. Florida, supra, 428 U.S. at 259-60. Since there is no rational or evenhanded way to treat Barclay's case differently than Lewis', Barclay's death sentence too must be vacated and resentencing ordered.

C. Application Of The Second Elledge Rule To Salvage Barclay's Death Sentence Would Itself Be Federally Unconstitutional

There are several sufficient reasons why the Elledge rules cannot constitutionally be applied to affirm Barclay's death sentence on the theory that, despite Lewis, Judge Olliff's failure to find any mitigating circumstances requires affirmance under Elledge.

First, if Lewis is regarded as having been overruled sub silentio and not merely capriciously disregarded by the contrary decisions in Bolender, White, Johnson and Dobbert, then the Elledge rule requiring affirmance in the absence of a finding of mitigating circumstances plainly falls afoul of Lockett v. Ohio. For Lewis is the only case in which the Florida Supreme Court has reversed a death sentence under Elledge because of the existence of non-statutory mitigating circumstances. In Ford v. State, 374 So.2d 496, 503 (Fla. 1979), the court expressly refused to

reverse a death sentence despite "error in assessment of some of the statutory aggravating factors," because "there being no mitigating factors present, death is presumed to be the appropriate penalty [under] Elledge ...." It did so while simultaneously acknowledging the "testimony favorable to appellant's character and prior behavior presented by the defense in mitigation during the sentencing trial." Ibid. Thus, it appears that -- save for Lewis -- nonstatutory mitigating factors which can (and, indeed, must) be considered by the advisory jury and sentencing judge are not "mitigating circumstances" within the Elledge rules.31/ Such rules can simply not be squared with Lockett.

31/ See Moody v. State, 418 So.2d 989, 995 (Fla. 1982). In Moody, the Florida Supreme Court identified two defects in the sentencing proceedings: (1) an improperly applied aggravating circumstance; and (2) a possible failure of the sentencing judge to consider nonstatutory mitigating evidence that had been presented to the jury. In reversing

Second, the announced "state-law premises"[32] of the Elledge rules establish their unconstitutionality for a reason that appears a fortiori from Justice Stevens' recent observations concerning a

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31/ (continued)

on account of both defects, the court explicitly distinguished between statutory and nonstatutory mitigating circumstances, applying the Elledge rule to the former but not the latter: "Since the trial court erroneously considered an aggravating circumstance not supported by the evidence, since there was a valid statutory mitigating circumstance, and since the trial judge may not have considered nonstatutory mitigating factors, we set aside the death sentence and remand ...." Ibid. See also Enmund v. State, 399 So.2d 1362, 1370-71, 1372-73 (Fla. 1981), rev'd on other grounds sub nom. Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140 (1982) (finding that the trial judge improperly relied upon two statutory aggravating circumstances not supported by the evidence; also finding that the defendant was not the triggerman and was not even present at the scene when a coparticipant in a robbery scheme shot the victims, and that "the evidence does not establish that [defendant] intended to take life"; but affirming the death sentence anyway, because there were two valid "aggravating circumstances ... and no mitigating circumstances"). See generally, Enmund v. Florida, supra, 73 L.Ed.2d at 1170-73 (dissenting opinion of Justice O'Connor).

32/ Zant v. Stephens, ___U.S. ___, 72 L.Ed.2d 222, 226 (1982).

less glaring deficiency in North Carolina's capital sentencing procedures. Smith v. North Carolina, ___ U.S. ___, 51 U.S.L.W. 3418 (U.S., Nov. 29, 1982)(opinion of Justice Stevens on denial of certiorari). Elledge says that findings of nonstatutory or other improper aggravating circumstances may be disregarded if there are no mitigating circumstances and "there are some [valid] statutory aggravating circumstances, [because] there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute." Elledge v. State, supra, 346 So.2d at 1003 (emphasis in original). This necessarily means that, in the absence of mitigating circumstances, the statutory "weighing process" consists of weighing zero in mitigation against any thing at all in aggravation: it does not

matter what in aggravation, since the whole point of Elledge's reasoning is that the quantity and quality of aggravation is irrelevant "so long as there are some statutory aggravating circumstances," ibid., and nothing mitigating to weigh against them. But death may not be thus decreed by a process which asks merely whether aggravation outweighs mitigation, without asking also whether the amount and kind of aggravation justify a capital sentence. To do so would require death even though the aggravation is a peppercorn's worth -- not enough to establish that the defendant is any more deserving of a death sentence than any other capital offender, and therefore not enough "to distinguish this case ... from the many cases in which [death] ... was not [inflicted]," Godfrey v. Georgia, supra, 446 U.S. at 433 -- because, in any situation to which Elledge's "weighing

process" applies, this indistinguishable peppercorn necessarily outweighs zero in mitigation. Such a "weighing process" misses the whole point, and violates the constitutional premise, of this Court's repeated insistence upon an individualized sentencing inquiry in capital cases "in order to ensure the reliability, under Eighth Amendment standards, of the determination that 'death is the appropriate punishment in a specific case.'" Lockett v. Ohio, supra, 438 U.S at 601, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Under Woodson and Lockett, the ultimate, indispensable constitutional inquiry must be the appropriateness of a death sentence for the defendant at bar, not some abstract weighing of scintillas against ciphers.

Third, if the "weighing process" envisaged by the Florida statute is to

escape the preceding objection, it must be because the sufficiency, and not merely the existence, of aggravating circumstances is to be considered, even where no mitigating factors are found. In Proffitt, this Court clearly assumed that that was the way in which the Florida statute worked, describing it (in its own words) as requiring that a death sentence be based upon the two findings "'(a) [t]hat sufficient [statutory] aggravating circumstances exist ... and (b) [t]hat there are insufficient [statutory] mitigating circumstances ... to outweigh the aggravating circumstances.'" Proffitt v. Florida, supra, 428 U.S. at 250 (bracketed material and elipses in original; emphasis added). Upon this assumption, Elledge stands for the proposition that a trial judge's ultimate finding that "sufficient [statutory] aggravating circumstances exist" to call

for the death penalty must be affirmed, despite the invalidity of a substantial part (amounting in Barclay's case to most) of the specific findings of aggravating circumstances which underlie the general one. That proposition cannot be defended consistently with either this Court's decisions establishing the necessary procedural framework for protection of federal constitutional rights in general (i.e., Stromberg v. California, 283 U.S. 359 (1931), and its progeny)[33] or with the Court's decisions more particularly invalidating "procedural rules that tended to diminish the reliability of the

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33/ See, e.g., Williams v. North Carolina, 317 U.S. 287, 291-92 (1942); Thomas v. Collins, 323 U.S. 516, 528-29 (1945); Cramer v. United States, 325 U.S. 1, 36 n.45 (1945); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Gregory v. Chicago, 394 U.S. 111, 113 (1969); Street v. New York, 394 U.S. 576, 585-88 (1969); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970); Sandstrom v. Montana, 442 U.S. 510, 526 (1979).

[capital] sentencing determination," Beck v. Alabama, 447 U.S. 625, 638 (1980); see id. at 638 n.13, citing cases.

We shall not impose upon the Court's time by discussing the Stromberg line at any length. It is described, and its applicability in the context of capital sentencing determinations is examined, in Part II of the Brief for Respondent in Zant v. Stephens, No. 81-89, at 30-39, and in Part I of the Supplemental Brief for Respondent in Zant (not yet paginated). Here it suffices to say that the rule of this Court for half a century under Stromberg has invariably been that a general verdict or judgment resting ambiguously upon a mixture of constitutional and unconstitutional premises must be set aside, because of the inability of a reviewing court to satisfy itself with any confidence that the unconstitutional premises did not enter into and decisively

affect the result in the trial court. That rule applies to general judgments by judges as well as to general verdicts by juries (see, e.g., Thomas v. Collins, 323 U.S. 516, 528-29 (1945)); it applies to cases in which the trial-court decisionmaker may have relied in part upon the unconstitutional premise, as well as to those in which the decisionmaker may have relied wholly on the unconstitutional premise (see Street v. New York, 394 U.S 576, 587-88 (1969)). Since the sufficiency of a totality of aggravating circumstances to call for the death sentence is manifestly the kind of opaque general judgment with which Stromberg and its line are concerned -- i.e., a judgment which, although resting on anterior findings of fact, is not compelled by any of those but involves the additional task of assessing the cumulative worth and weight of the underlying individ-

ual findings -- this judgment must be governed by Stromberg's familiar principle. Since the impact of unconstitutional aggravating-circumstances findings in producing a death sentence based partly (and, in Barclay's case, preponderately) upon them cannot be known, it would flout the Constitution to affirm such a death sentence without a remand "to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court," Eddings v. Oklahoma, supra, 455 U.S. at 119 (concurring opinion of Justice O'Connor).

It would also tax the Court's time unnecessarily to re-plow here the parallel Eighth Amendment ground examined in Part I of the Brief for Respondent in Zant v. Stephens, supra at 22-30. The nub of the matter is, as Justice O'Connor succinctly put it in her Eddings concurrence, that

"this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." 455 U.S. at 118. Consistently with that view of judicial responsibility in death cases, "[g]uarding against the arbitrary and dicriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more." Henry v.Wainwright, supra, 661 F.2d at 59-60 (footnote omitted).

CONCLUSION

Elwood Barclay's death sentence rests

upon a welter of nonstatutory, lawless and extraneous findings of aggravating circumstances. How much these weighed in the trial judge's decision to override a jury recommendation of mercy and sentence Barclay to die cannot be calculated. The risk that they were influential is substantial,[34] and was not abated by the Florida Supreme Court's perfunctory performance of its sentencing-review function in this case. "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v.Ohio, supra, 438 U.S. at 605. The judgment below should be reversed insofar as it upholds the penalty of death, so that Barclay may be resentenced in proceedings that observe the Constitution.

34/ "We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner [received]." Townsend v. Burke, 334 U.S. 736, 740 (1948).

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APPENDIX

STATUTORY PROVISIONS INVOLVED

At the time of petitioner's trial, the following provisions of the Florida Statutes were in effect:

Fla.Stat.Ann. § 782.04.[1/]

1/ Section 782.04 has been amended since petitioner's trial. It now provides:

782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to

782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging

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1/ continued

determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act immediately dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to affect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in § 775.082, § 775.083, or § 775.084.

(3) When a person is killed in perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharg-

of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

1/ continued

ing of a destructive device or bomb by a person other than the person engaged in the perpetration or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony in the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to pertetrate, any felony other than any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb,

(b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree, punishable by im-

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1/ continued

shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

prisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Fla. Stat. Ann. § 921.141

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty -- Upon conviction or adjudication of guilt of a defendant of a capital

felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossiblity or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chaper 913 to determine the issue of the impositon of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter

that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7).[2/] Any such evidence which the court deems to have probative value may be received, regardless of its admissiblity under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or the

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2/ Since petitioner's trial, this sentence has been amended. It now provides:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6).

State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist;[3] and

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3/ Since petitioner's trial, this sentence has been amended. It now provides:

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist.

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death -- Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated insubsection (7), to outweigh the aggravating cir-

cumstances.[4/] In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of facts based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.08.

(4) Review of judgment and sentence -- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire

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4/ Since petitioner's trial, this sentence has been amended. It now provides:

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) That defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was

an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felonv was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.[5/]

5/ Since petitioner's trial, Fla. Stat. Ann. § 921.141(5) has been amended to

(6) Mitigating circumstances -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

5/ continued
include an addtional subsection, "(i)." Subsection "(i)" provides:

> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 74-2024 DIVISION: S
74-2131

STATE OF FLORIDA

-vs-

WALTER ALBERT CARNES

SENTENCE

The Defendant was indicted for the crimes of Murder in the First Degree of LESLIE VAN RICH and Rape of his female companion, SHIRLEY TOWNSEND.

ESSENTIAL FACTS:

The essential facts brought out at the trial were that Shirley Townsend, 35 and Leslie Van Rich, 27 had been living together in Jacksonville with

Mrs. Townsend's 11 year old daughter. That on May 12 the two adults and child were on their way back to their native Ohio when their car broke down on U.S. 1 about noon.

That the two adults tried to flag down several passing trucks for assistance but were unsuccessful. At this time the defendant, Carnes, drove up and volunteered his assistance and showed them his Merchant Seaman Identification to allay their fears as to his intentions.

That defendant offered to drive them back to Jacksonville and while doing so he got them inside his house upon a ruse. While Mr. Rich, Mrs. Townsend and the 11 year old girl were inside - defendant pulled a pistol, ordered

them to lie on a bed and tied their wrists and ankles.

That defendant cut Rich's ankles loose, took him to the back portion of the house, scuffled with him and stabbed him twice with a butcher knife and while Rich was writhing on the floor begging for help - Carnes knelt and shot him twice - at close range, in the middle of the back and in the back of the head, causing instant death.

The defendant subsequently twice raped Mrs. Townsend - once in the presence of her 11 year old daughter. Several hours later he fell asleep after consuming alcoholic beverages and Mrs. Townsend, who was a prisoner in the bed with him escaped with her daughter

- police were called to the scene and the defendant arrested.

The Jury of 12 people found the defendant Guilty of Murder in the First Degree of Rich and Rape of Mrs. Townsend, and the case was passed for Pre-Sentence Investigation and for Sentence.

The Court having heard all the evidence in this case and having previously heard and denied Motion for New Trial - does hereby adjudge the defendant guilty of each crime of which he has been found guilty and sentences him as follows:

A. As to the crime of Rape, I impose the maximum sentence of Life Imprisonment to run consecutive to the sentence imposed below herein for the crime of Murder in the First Degree.

B. As to the crime of Murder in the

First Degree The Court imposes the maximum possible sentence requiring the forfeit of the life of defendant.

C. Ordinarily it would be a useless act to run the maximum sentence for Rape consecutive to the maximum sentence for Murder in the First Degree. This is done in this case for the reason that there are now, before the Courts, challenges to the maximum penalty in First Degree Murder cases. Should such challenges prevail this Court would re-impose the maximum possible sentence for Murder in the First Degree and run the maximum possible sentence for Rape consecutive thereto.

Before imposing the sentence for Murder in the First Degree, the Court has closely examined and written its findings as to

each of the elements of aggravation and/or mitigation which are set forth in Florida Statutes and which were guide-lines for the Jury in considering its Advisory Sentence.

The Court has summarized the facts as brought out in the trial and in the Pre-Sentence Investigation Report and applied them to each element of aggravation and/or mitigation where applicable.

In summarizing these elements the Court has listed them in reverse order by considering first the elements of mitigation.

MITIGATING CIRCUMSTANCES

A. WHETHER DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FACT:

There are several misdemeanor arrests shown on Defendant's Rap Sheet - most

of which do not show a disposition. His first arrest is shown to be in 1963 - but significantly he was arrested for the felony of (CCF) carrying a concealed firearm on May 4, 1974, which was nine days before the crimes of which he now stands convicted. (See Rap Sheet EXHIBIT #1.)

FACT:

In addition the charges of which he stands convicted there is pending in this Court a charge of Assault to Murder wherein defendant is charged with assault to murder in the first degree upon his estranged wife, Catherine Carnes, on May 3, 1974, by assaulting her with a gun. (See photocopy of Information - attached as EXHIBIT #2.)

FACT:

That according to the Information gained by the Pre-Sentence Investigation Report - which is attached hereto as EXHIBIT #3, the defendant had, three months prior to the murder, threatened the wife and children with a pistol. That one week prior to the murder the defendant had fired six shots into the residence where his estranged wife was staying with her three children, mother and grand mother.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the prior acts of defendant gain significance by the fact that they shortly preceded the murder and rape of which he stands convicted.

B. WHETHER THE MURDER WAS COMMITTED WHILE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

FACT:

The defendant did testify that he and his wife were separated at the time of the crimes - and that fact caused him concern.

FACT:

That there was no claim or defense of insanity, but upon Motion by Defense the defendant was examined by Dr. Ernest C. Miller, Psychiatrist, who reported that defendant was competent to stand trial and that he was, at the time of the crimes, able to understand the nature, quality and wrongfulness of his acts. Dr. Miller found no history of prior treatment for emo-

tional disorders. (See Doctor's Report attached as EXHIBIT #4.)

FACT:

That the Doctor reported that based on information provided to him by the defendant that he concluded defendant was in a state of self-induced intoxication at the time of the crime (which contention is refuted by the facts as set forth in Paragraph F.) The Doctor did not find that Defendant was under the influence of extreme mental or emotional disturbance at the time of the crime.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there is little, if any, evidence of extreme mental or emotional disturbance at the

time of the crimes.

C. WHETHER THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

FACT:

The defendant tricked the victims, Mr. Rich, Mrs. Townsend and her daughter into his car and into his home. There, he pulled a pistol, tied them up, then untied and stabbed and shot Rich and raped Mrs. Townsend in the presence of her own child.

CONCLUSION:

There is no mitigating circumstance under this paragraph because defendant committed the murder and rape without any consent or participation by his victims.

D. WHETHER DEFENDANT WAS AN ACCOMPLICE IN THE MURDER COMMITTED BY ANOTHER PERSON, AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR.

FACT:

The evidence shows that defendant alone without aid or assistance from anyone else - committed the murder and rape.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

E. WHETHER THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:

No such element of duress was ascertained by the factual situation or by the Psychiatrist who examined defendant. The defendant did tell the

doctor that he was separated from his wife and that he had been drinking when the crime occurred. The word duress is defined in the dictionary as "Hardship - Severity, Imprisonment; also constraint; compulsion." Using those or even more inclusive definitions - there was absolutely no element of duress shown in the facts or in the Doctor's Report which would explain, mitigate or expiate the quality of the crime.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

F. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

FACT:

As stated in Paragraph B above, Dr. Miller made written report to this Court, EXHIBIT #4, and in such report found only that defendant was separated from his wife and was drinking at the time when the crimes occurred.

FACT:

The defendant told the Doctor that he was intoxicated at the time of the crimes - yet his actions belie that contention as well. He drove the victims to his home, pulled a pistol, tied them up - released Rich and scuffled with him, stabbed him and shot him. He then forced Mrs. Townsend and her daughter to his car and drove to a Drive-In Liquor Store - at all times holding his pistol pointed at his victims. Upon returning to his

home he continued to remain armed and ordered Mrs. Townsend to prepare dinner - which he ate and then raped her in the presence of her child. That, finally, after raping her the second time - and after he had consumed a goodly portion of liquor - he went to sleep in the bed with Mrs. Townsend and she later escaped. Those actions up to and including the last act of rape were hardly those of an intoxicated man and in fact required mental and physical alertness.

FACT:

That one of the defenses was that of intoxication and the charge on intoxication from from Page 20 of the Florida Standard Jury Instructions in Criminal Cases - was given to the Jury, and they apparently did not

think he was intoxicated because they found him guilty of Murder and Rape.

OBITER DICTUM:

That the only incapacity suffered by the defendant was that he was separated from his wife and was drinking alcoholic beverages. If such conditions are said to substantially impair a man's appreciation of his criminal conduct - then it would be a Carte Blanche Invitation for the decimation of a portion of the population by men similarly situated as was the defendant herein.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

G. THE AGE OF DEFENDANT AT THE TIME OF THE CRIME.

FACT:

The defendant was born July 15, 1943 and was thirty years of age at the time of the Murder and Rape. The report of the Doctor showed that he was a physically mature male standing five feet - eleven inches tall, weighing One Hundred Ninety Four pounds and of average intelligence.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

THE COURT NOW SUMMARIZES THE FACTS BROUGHT OUT IN TRIAL AND THE PRE-SENTENCE INVESTIGATION REPORT AND APPLIES THEM TO THE ELEMENTS OF AGGRAVATION WHICH WERE CONSIDERED BY THE JURY IN ARRIVING AT THEIR ADVISORY SENTENCE.

AGGRAVATING CIRCUMSTANCES

A. WHETHER THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER OF WHICH HE WAS CONVICTED.

FACT:

The defendant was not imprisoned at the time of the murder, however, he was previously charged with assault to murder his wife and was out on bond from that charge at the time of the murder.

CONCLUSION:

Although not imprisoned - his status at the time of the crime is significant because he was on bond for a felony charge which implied great physical danger to the victim. This is more an aggravating than mitigating circumstance.

B. WHETHER THE DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OF [sic] THREAT OF VIOLENCE TO THE PERSON.

FACT:

Although not previously convicted - the defendant was previously charged with a felony involving the use of [sic] threat of violence to the person of his wife, and the Pre-Sentence Investigation Report shows that he allegedly fired six shots into a house in which his wife was staying and that three months before the murder he allegedly threatened both his wife and children with a gun, and had also been charged with the felony of carrying a concealed firearm.

CONCLUSION:

The only element lacking under this paragraph was that he had not been convicted of such crime - even though he had been charged with it. This is more of an aggravating than a mitigating circumstance.

C. WHETHER, IN COMMITTING THE MURDER OF WHICH HE HAS JUST BEEN CONVICTED, THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

FACT:

The testimony shows that after the defendant got Mr. Rich, Mrs. Townsend and her daughter in his home - that he pointed a gun at all of them and threatened to kill them if they did not do as he ordered.

FACT:

That after the defendant murdered Rich

- he held the knife on Mrs. Townsend and ordered her to perform fellatio upon him.

FACT:

That he drove Mrs. Townsend and her daughter to a Drive-In Liquor Store and at all times, to and from the Liquor Store, he pointed the pistol at Mrs. Townsend and her daughter.

FACT:

That he raped Mrs. Townsend at gun-point while her daughter lay on the floor next to the bed.

FACT:

That, finally, he forced Mrs. Townsend to lie in bed with him while he had his gun and butcher knife within reach. Mercifully, he fell to sleep and she and her daughter escaped.

FACT:

That Mrs. Townsend and her daughter were held hostage for approximately twelve hours by defendant who was armed with a butcher knife and pistol.

CONCLUSION:

There is an aggravating circumstance under this paragraph because not only did defendant murder Mr. Rich - but he created a great risk of death to Mrs. Townsend and her 11 year old daughter.

D. WHETHER THE MURDER OF WHICH DEFENDANT WAS CONVICTED WAS COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DIS-

CHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

FACT:

That Shirley Townsend, her 11 year old daughter and Leslie Van RIch were taken to defendant's home, tied hand and foot. Rich was subsequently murdered by the defendant - which left Mrs. Townsend and her daughter to the tender mercies of the defendant. He threatened them both with knife and gun and twice raped Mrs. Townsend.

FACT:

That within minutes after murdering Mr. Rich, the defendant attempted to force Mrs. Townsend to perform oral intercourse upon him. These established and uncontraverted facts lead inevitably and inexorably to the

conclusion that Rich was murdered to remove an obstacle to the sexual assault. Thus, whether, murder was done while engaged in or attempting to commit a rape, or in eliminating the hindrance to its commission - it is clear that this crime comes within the meaning and intent of this paragraph.

CONCLUSION:

There is an aggravating circumstance under this paragraph.

E. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

This paragraph does not seem to apply to the present case.

F. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR PECUNIARY GAIN.

This paragraph does not seem to apply to the present case.

G. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF THE LAWS.

This paragraph does not seem to apply to the present case.

H. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

FACT:

The Defendant calculatedly and deliberately took the victims off the

highway - induced them into his home, where he twice stabbed Rich - whose only offense was that he resisted being murdered. Then, as Rich lay on the floor, writhing in pain and begging for help, the defendant knelt and placed a 44 caliber magnum pistol within inches of Rich's body and fatally shot him in the mid-back and the back of the head. That within minutes after perfoming the execution type murder - the defendant ordered Mrs. Townsend into a bedroom, dropped his trousers and requested that she perform fellatio upon him. The defendant then held the woman and her daughter hostage for 12 terror filled hours.

That such acts of the defendant shriek of callous, depraved homicidal premeditation of the basest type.

CONCLUSION:

The murder of which the defendant has been convicted was especially heinous, atrocious and cruel.

CONCLUSION OF THE COURT

THERE ARE SUFFICIENT AND GREAT AGGRAVATING CIRCUMSTANCES WHICH EXIST TO JUSTIFY THE SENTENCE OF DEATH.

In concluding these findings I would like to point out the following:

That under Florida Law the Judge sentences a defendant, convicted of Murder in the First Degree, either to death or life imprisonment. This is an awesome burden to be placed upon a Judge - but in the landmark Florida case of State vs. Dixon 283 So.2d 1, The Florida Supreme Court said that

when such discretion can "be shown to be reasonable and controlled, rather than capricious and discriminatory then it meets the test of Furman v. Georgia 408 U.S. 238."

My 22 years of legal experience have been almost exclusively in the field of Criminal Law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office on major crimes, a Prosecutor for eight and one-half years and a Criminal Court Judge and Circuit Court Judge - Felony Division - for almost four years. During these 22 years I have defended, prosecuted and held trial in almost every type of serious crime.

Because of this extensive experience I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.

My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. During World War II, I was a United States Army Paratrooper and served overseas in ground combat. I have seen friends blown to bits and have seen death and suffering in almost every conceivable form.

I am not easily shocked or moved by tragedy - but this was an expecially [sic] shocking crime.

The defendant took the life of another human being by a murder that was heinous, atrocious and cruel - and he deserves to forfeit his life.

HAVING ADJUDGED YOU GUILTY OF MURDER IN THE FIRST DEGREE, I HEREBY SENTENCE YOU TO DEATH. I ORDER THAT YOU BE TAKEN BY THE PROPER AUTHORITIES TO THE FLORIDA STATE PRISON AND THERE KEPT IN CLOSE CONFINEMENT UNTIL THE DATE OF YOUR EXECUTION BE SET. THAT ON SUCH DAY YOU BE PUT TO DEATH BY HAVING ELECTRICAL CURRENTS PASSED THROUGH YOUR BODY IN SUCH AMOUNTS AND FREQUENCY UNTIL YOU ARE RENDERED DEAD.

I ADVISE YOU THAT YOU HAVE THIRTY DAYS FROM TODAY TO TAKE AN APPEAL OF THE SENTENCES WHICH I HAVE JUST IMPOSED UPON YOU AND I HEREBY APPOINT THE PUBLIC DEFENDER'S OFFICE TO REPRESENT YOU ON THE APPEAL.

MAY GOD HAVE MERCY ON YOUR SOUL.

DONE AND ORDERED AND SENTENCED IN OPEN COURT AT THE DUVAL COUNTY COURTHOUSE, JACKSONVILLE, FLORIDA, THIS THE 19TH DAY OF NOVEMBER, 1974.

/s/ Hudson Olliff
HUSDON OLLIFF, CIRCUIT JUDGE

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO. 76-1161 DIVISION: S

STATE OF FLORIDA

-vs-

ROBERT FIELDMORE LEWIS

S E N T E N C E

The defendant, Robert Fieldmore Lewis, was indicted for the crime of Murder in the First Degree of Joseph Lynwood Richards by shooting him to death. He was found guilty by jury of murder in the first degree and the case was passed until today for sentence.

Another defendant, Eddie Lee Odum, was also indicted in the murder of Richards but he was tried separately by another judge and was also convicted of murder in the first degree and previously sentenced to death by that Judge.

The fact that Eddie Lee Odum was sentenced to death for his participation in this premeditated murder - is immaterial and has no bearing upon this sentence. The sentence of Lewis is imposed on its own merits and based upon his participation in the murder.

It is interesting and yet appalling to note - that LEWIS WAS ON PAROLE FROM THE FLORIDA STATE PRISON AT THE TIME OF THIS MURDER. Odum was on MANDATORY CONDITIONAL RELEASE FROM FEDERAL PRISON.

SUMMARY OF FACTS OF CRIME

A summary of the facts of this murder as brought out in the trial were that: On January 27, 1976, Lewis and Odum advised Charles James Carter that they intended to kill Joseph Lynwood Richards and Lewis asked Carter for a shotgun. Carter testified that he got

a 12-guage [sic] shotgun and met Lewis and Odum later that evening. He testified that he drove a van, in which Lewis and Odum were riding, to the residence of Richards at 347 Trout River Drive here in Jacksonville, Florida.

Carter testified that he parked the van near the Richard's [sic] residence and that Lewis, armed with the shotgun, and Odum, armed with the rifle, went to the back of the residence. Carter said that he then heard three or fourloud [sic] shots and that Lewis and Odum came running back to the van and they sped away.

Carter said that Lewis and Odum told him that they had shot Richards while he was laying on a bed and that two women were sitting at the end of the

bed. Carter further testified that he threw the rifle in the river and hid the shotgun. Both guns were introduced into evidence and were positively identified by Carter as the murder weapons.

Testimony of investigating officers was that the entire top right portion of Richard's head had been blown away and that there were multiple wounds of the right upper arm, lower forearm, right upper torso and right thigh. Particles of blood, brains and skull matter were evidenced throughout the bedroom and the adjourning bathroom and hall area and were on the walls, ceiling and floor. The largest remaining portions of the brain was [sic] lying on the floor near the bed.

The medical examiner, an expert in phorensic [sic] pathology, testified that the massive wounds to the head were caused by a shotgun and rifle. He stated that the head contained pellets and wadding from a 12 guage [sic] shotgun and a rifle bullet. He testified that Richards had been shot from a range of 6 to 8 feet and that he had been shot 4 times with a shotgun and 2 to 3 times with a rifle. He said that either the shotgun or rifle wounds could have caused death.

The two women testified that they were sitting at the foot of the bed in which Richards was laying at the time of the shooting. They were spattered with Richards' blood and body fragments and one of the women was struck by a lead fragment from one of the

weapons. Fortunately neither of them was seriously injured or killed by the repeated blast from the deadly weapons.

The Court having heard all of the evidence in this case, having denied a motion for a new trial and having studied trial notes and the PRE-SENTENCE INVESTIGATION REPORT (PSI - a sealed copy of which is attached), is prepared to impose sentence herein. Before imposing such sentence this Court has closely examined and written its findings as to each of the elements of aggravation and/or mitigation which are set forth in Florida Statutes 941.141 [sic] and which were guidelines for the jury in considering the advisory sentence.

In summarizing these elements of aggravation and/or mitigation, the Court has listed them in reverse order - as follows:

MITIGATING CIRCUMSTANCES 941.141 [sic]

A. THAT THE DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FACT:

That from 1-14-66 up to the date of this convicton the defendant had been arrested 14 times.

FACT:

That the PSI showed that he was convicted of at least 8 misdemeanors and at least 5 felonies.

FACT:

That in 1971, I sentenced this defendant to 7 years in the State Prison for the crime of POSSESSION OF A FIREARM BY A CONVICTED FELON. That before he had finished serving that term he was given parole on 11-5-74.

FACT:

The at the time of this murder the defendant was on PAROLE AND WHILE ON

PAROLE HE WAS CONVICTED OF AT LEAST 7 MISDEMEANORS BEFORE THE COMMISSION OF MURDER.

Unfortunately no action was taken to have his parole revoked before the commission of this murder.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there is a history of a great amount of criminal activity by defendant prior to the commission of this murder.

B. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OF [SIC] EMOTIONAL DISTURBANCE:

FACT:

There was no evidence of any extreme mental or emotional disturbance at the

time of the murder. In fact the defense was that of an alibi. This alibi was established, in part, by relatives and friends who stated that on the day and night of the murder, the defendant was alternately "riding around with a friend, at a fish fry, at home with his girlfriend and his mother and with friends at a night-club." His girlfriend testified that after the murder he returned home and requested her and his mother to get rid of his clothing - then he re-dressed and went to the Pussy Cat night club for a festive evening.

FACT:

There is absolutely no evidence or testimony that the defendant was under the influence of extreme mental or emotional disturbance at the time of

this murder and no such inference can be drawn or implied.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there is no evidence of emotional distress. Perhaps the best indication of his mental attitude after the murder was his direction to his girlfriend and mother to get rid of the murder clothes and then going out for a night on the town.

C. THAT THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

FACT:

The evidence showed that the defendant shot the victim a number of times in the head at close range with a shotgun

- blowing away portions of his head and causing his instant death. There was no evidence that the victim had entred into a suicide pact with his assailants or that he knew of their plan to murder him - or that he participated in his own murder.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the defendant did - by stealth and pre-meditation - shoot and kill the victim and the same was obviously done without the foreknowledge or consent of the victim.

D. THAT THE DEFENDANT WAS AN ACCOMPLICE IN THE OFFENSE FOR WHICH HE IS TO BE SENTENCED BUT THE OFFENSE WAS COMMITTED BY ANOTHER PERSON AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR.

FACT:

The defendant, Lewis, was a principal with Odum in the premeditated murder of the victim, Richards. The evidence established that Lewis had a shotgun and that Odum had a rifle and that they both fired a number of shots into the head and body of the victim. The medical examiner stated either the shotgun or rifle wounds could have caused the death.

FACT:

There was absolutely no evidence presented in the trial or otherwise which indicted Lewis was more or less of a willing participant in the murder than was Odum. The defense was that of alibi and it was not heard to be said that the crime was primarily committed by Odum - or that the

participation of Lewis was relatively minor.

CONCLUSION:

There is no mitigating circumstance under this paragraph because it appears from the evidence at trial that the defendant was a principal and that his own participation was at least equal to that of the other defendant, Odum.

E. THAT THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:

Although there was some testimony that Richards had previously threatend Lewis and Odum - there was no evidence or testimony that Lewis was under duress on the day of the murder or at any time leading up to that date.

FACT:

There was no evidence or testimony that Lewis was under the substantial domination of Odum - or that Odum was under the substantial domination of Lewis. The facts and testimony indicate that both Lewis and Odum equally planned and participated in the murder of Richards.

CONCLUSION:

There is no mitigating circumstance under this paragraph. The evidence shows that Lewis was an equal and eager participant in the murder.

F. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

FACT:

The defendant had - during his life of crime - been arrested at least 14 times and had been convicted of at least 4 felonies and 8 misdemeanors. He, above all people, should have understood and appreciated the criminality of his conduct. His terms in the county jail and in the state prison - would have impressed even the most obtuse person with the consequences of criminal acts and certainly with the criminality of premeditated murder. His actions in telling his girl friend and his mother to get rid of his murder clothes is certainly evidence of his keen understanding of the criminality of his acts and the consequences of them.

FACT:

There is no evidence that the defendant's capacity to conform his conduct to the requirements of the law was substantially impaired. There was no claim of insanity, or incompetency or diminished capacity. In fact the only evidence of his mental capaciaty is found in the PSI. In that report it shows that after the defendant was arrested for a felony in 1971, he was examined by the psychiatrist, Dr. Ernest Miller. Dr. Miller reported that he was competent to stand trial and that the defendant had "a passive dependent personality with very prominient [sic] paranoid and psychopathic components." Subsequently he was sentenced to 7 years in the State Prison. Since that time there is no

evidence of psychiatric treatment or examination.

FACT:

That the defense herein was alibi and there is no evidence or testimony by defense witnesses or other witnesses that defendant's ability to conform his conduct to the requirements of the law was substantially impaired.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

G. AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

FACT:

That at the time of the crime the defendant was 28 years of age. He was not a callow youth. He had completed the ninth grade of school,

had served in the military, had served terms in the state prison and the county jail and had been married and fathered children in and out of marriage. (See PSI) His age is an immaterial factor in this case except that it shows that he was a mature man capable of appreciating the enormity of his crime and the possible consequences thereof.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

CONCLUSION OF THE COURT

There are no mitigating circumstances existing either by statute or factually - which outweigh the aggravating circumstances to justify a sentence of life

imprisonment rather than a sentence of death.

THE COURT NOW SUMMARIZES THE FACTS BROUGHT OUT IN TRIAL AND THE PRE-SENTENCE INVESTIGATION REPORT AND APPLIES THEM TO THE ELEMENTS OF AGGRAVATION WHICH WERE CONSIDERED BY THE JURY IN ARRIVING AT THEIR ADVISORY SENTENCE.

AGGRAVATING CIRCUMSTANCES 941.141 [sic]

A. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT.

FACT:

The PSI attached shows the full and complete criminal record of the defendant. He had previously been convicted of at least 4 felonies. IN [sic] the year 1971, this defendant

appeared before me and I sentenced him to a term of 7 years in the State Prison for the crime of possession of a firearm by a convicted felon.

FACT:

That before he had finished serving the term I imposed upon him - he was placed on parole on 11-5-74, and he was out on parole at the time of this murder. In fact he was still under sentence of imprisonment but was on parole.

FACT:

That not only was the defendant under a sentence of imprisonment at the time of the murder - but significantly - the crime for which he was under sentence was for possession of a firearm by a convicted felon.

FACT:

That while on parole the defendant was convicted of at least 7 misdemeanors and for 4 of those misdemeanors he was sentenced to terms in the County Jail. It appears no action was taken to revoke his parole for his criminal activities or his failure to comply with the terms and conditions of parole before he committed this murder.

CONCLUSION:

This is an aggravating circumstance because he had been sentenced to a term in the State Prison and was given a parole before he finished serving that term and was under parole at the time of this murder.

B. THAT AT THE TIME OF THE CRIME FOR WHICH HE IS TO BE SENTENCED. [sic] THE DEFENDANT HAD BEEN PREVIOUSLY CONVICTED OF ANOTHER CAPITAL OFFENSE OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO SOME PERSON.

FACT:

That on 1-4-66 the defendant was convicted of breaking and entering with intent to commit a felony and grand larceny. He was placed on two years probation. The breaking and entering into the house or building of another person is a crime where violence or threat of violence is always present - since there is imminent danger of confrontation between the defendant and the unsuspecting victim.

FACT:

Approximately 11 months later - on 12-23-66, the defendant was again convicted of the crime of breaking and entering with the intent to commit a felony and on this occasion he was sentenced to a term of 2 years in the Duval County Jail. Here again, is a crime where violence or threat of violence is present in the nature of the crime itself.

FACT:

On 10-25-67 the defendant was convicted of the felony of escape while serving the term as set forth in the paragraph above. Whether any violence was involved in the escape is not known.

FACT:

On 9-9-68 the defendant was again convicted of the crime of escape. Whether any violence was involved in the escape is not known.

FACT:

On 7-27-71 the defendant was convicted of Possession of Firearm by a Convicted Felon. Such a crime certainly seems to involve the threat of violence - when a convicted felon is in possession of a firearm. The threat of violence inherent in such a crime is so apparent that the statutes make it a felony in the second degree even without requiring an overt act with the firearm by the felon.

CONCLUSION:

There is an aggravating circumstance

here in view of the nature of the crimes for which he was previously convicted.

C. THAT THE DEFENDANT, IN COMMITTING THE CRIME FOR WHICH HE IS TO BE SENTENCED, KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS:

FACT:

That the defendant fired a shotgun 4 times at close range - into the body of Richards. That at the time such shots were fired - the defendant, Lewis knew that there were two women sitting at the foot of the bed where Richards was laying. A lead pellet struck one of the women. Both women were spattered with the victim's blood and particles from the upper portions of his head.

FACT:

That by firing a shotgun several times at such close range the defendant, Lewis, did create a great risk of death to the two women who were just a few feet from Richards. The fact that one of the women was hit by a pellet and both were spattered with blood and body fragments of the victim is evidence in itself that the defendant did create a great risk of death to the two women.

CONCLUSION:

That there is an aggravating circumstance here because in committing the murder of Richards the defendant, Lewis, did create a great risk of death to many persons.

D. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN OR WAS AN ACCOMPLICE IN THE COMMISSION OF OR AN ATTEMPT TO COMMIT OR A FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT ANY ROBBERY, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

FACT:

That this paragraph does not seem to be applicable even though it is evident that the defendant was in the commission of the felony of Possession of a Firearm by a Convicted Felon at the time of the murder - and was in violation of the terms and conditions of his parole, that is - associating with known felons - at the time of the

commission of the murder for which he is to be sentenced.

E. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

FACT:

This paragraph does not seem to apply to the present case.

F. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR PECUNIARY GAIN.

FACT:

That this paragraph does not seem to be applicable in the present case even though there was some testimony that Richards had previously made a demand

upon both Lewis and Odum for the payment of money.

G. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS:

FACT:

That this paragraph does not seem to be applicable to the present case.

H. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

FACT:

The defendants, Lewis and Odum, planned the premeditated murder of Richards and the testimony shows that they asked Carles [sic] Jimmy Carter

to assist them and to provide a shotgun.

FACT:

That, by pre-arrangement, Lewis and Odum met Carter at a place from which they proceeded by van to the residence of Richards. That Lewis, armed with a shotgun, and Odum, armed with a rifle, then proceeded to the Richards' residence and brutally shot him to death as he layed [sic] on the bed with two women sitting nearby.

FACT:

That this murder was coldly and calculatedly planned and stealthly [sic] carried out. IT WAS, IN FACT, AN ILLEGAL EXECUTION, and was not done in the heat of passion and lacked any elements of self-defense or any pretense of justification.

CONCLUSION:

The murder of which the defendant stands convicted was a cowardly and dastardly act of savage butchery - carried out under the cover of night and was in all respects an especially heinous, atrocious and cruel crime. That there are sufficient and great aggravating circumstances which exist to justify the sentence of death.

FINDINGS OF THE COURT

The heinous, atrocious and cruel nature of the crime together with the extensive criminal activities of the defendant shows that he is incapable of living in a free or institutional society and that his life should be forfeited.

THE SANCTITY OF LIFE IS REVERED BY ALL THINKING MEN - YET CAN IT BE SAID THAT

THE LIFE OF A CONVICTED MURDERER IS MORE PRECIOUS THAN THAT OF THE MURDER VICTIM? OBVIOUSLY NOT, - AND THEREFORE, THE MAXIMUM PENALTY OF DEATH MUST BE IMPOSED.

COMMENTS OF COURT

In concludng my findings I would like to point out that my 24 years of legal experience have been almost exclusively in the field of criminal law.

The Judge of this Court has been a defense attorney of criminal cases, a prosecutor for eight and one-half years, and Advisor to the Public Defender's Office and a Criminal Court and Circuit Court Judge - Felony Division for 6 years. That during this 24 years I have defended, prosecuted and held trial of almost every type of serious crime.

My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. During World War II, I was a United States Army Paratrooper and served in ground combat in Europe. I have seen death and suffering in almost every conceivable form.

I am not easily shocked or moved by tragedy - but this was an especially heinous, atrocious and cruel crime - and is deserving of no sentence but death.

S E N T E N C E

I hereby adjudge you to be guilty of murder in the first degree and I sentence you to death by electrocution. I order that you be taken by the proper authorities to the Florida State Prison and there kept

in close confinement until the date of your execution be set. That on such day you be put to death by havng electrical currents passed through your body in such amounts and frequency until you are rendered dead.

I advise you that you have thirty days from today in which to take an appeal from the conviction and sentence herein and I hereby appoint the Public Defender's Office to represent you on such appeal.

May God have mercy on your soul.

DONE AND ORDERED and SENTENCED in OPEN COURT this the 3rd. day of December, 1976, at Jacksonville, Duval County, Florida.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF, CIRCUIT JUDGE

FLORIDA PAROLE AND PROBATION COMMISSION

PRESENTENCE INVESTIGATION [EXCERPTS]

* * * *

II. PRIOR ARRESTS AND CONVICTIONS: A check with the records of the Jacksonville Sheriff's Office, the National Crime Information Center and the Florida Crime Information Center revealed that the defendant had the following arrests.

PLACE:	DATE	CHARGE	DISPOSITION
Jacksonville, Fla.	4-28-69	Petit Larceny Morals Charge	10 days suspended sentence
Jacksonville, Fla.	5-25-70	Grand Larceny	nol prossed
Jacksonville, Fla.	4-26-71	Uttering a Forgery (3 counts) Possession of Stolen Property	nol prossed
Jacksonville, Fla.	6-16-71	B & E With Intent to Commit a Felony & Grand Larceny	5 years probation

Jacksonville, Fla.	10-7-71	Breaking & Entering Possession of Stolen Property	nol prossed, discharged
Jacksonville, Fla.	11-1-71	Forgery and Uttering a Forgery	6 months County Jail
Jacksonville, Fla.	3-21-72	DC, Creating a Disturbance & DC, Profanity	nol prossed $25.00 suspended fine.

* * * *

CONFIDENTIAL EVALUATION

* * * *

II PRIOR ARRESTS AND CONVICTIONS:

Adult: The significant factors concerning the defendant's adult arrest record are that he has been placed on probation on two occassions [sic] and incarcerated on one.

On June 22, 1972 the defendant was placed on 3 years probation for the offense of attempted uttering of a forgery and he violated that probation by being re-arrested on a charge of Breaking and Entering. On November 1, 1971, his probation

was revoked at which time he was sentenced to serve 6 months in the County Jail. At that same time, however, the defendant was placed on a new 5 year term of probation for the new offense of Breaking and Entering With Intent to Commit a Misdemeanor. The defendant's progress under supervision relating to that period of probation was considered good and on January 25, 1974, his probation was terminated early because the best interest of society were [sic] felt to have been served.

Juvenile: A check with the records of the Jacksonville Juvenile Court failed to reflect any record for the defendant.

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